

[1] music services.  
[2] **Q.** I want to ask you a couple of questions about your specific  
[3] role in these negotiations. Did you actually participate in  
[4] in-person meetings?  
[5] **A.** Yes, I did.  
[6] **Q.** How about internal strategy sessions at BMI; did you  
[7] participate?  
[8] **A.** Absolutely.  
[9] **Q.** Did you actually speak at any of the meetings?  
[10] **A.** Yes, I did.  
[11] **Q.** Were there times when you actually spoke directly to  
[12] someone at Muzak without anyone being present at well?  
[13] **A.** Yes.  
[14] **Q.** Did your personal involvement in negotiations change over  
[15] time?  
[16] **A.** Yes. In the beginning I was, you know, early part I was  
[17] probably more of an observer, and as time went on, and closer  
[18] towards the last two years of dealing with this on and off, and  
[19] depending on where the negotiations were and how they took  
[20] place, but Marvin could be a lead, John Shaker might have been  
[21] and then there were times that I was.  
[22] **Q.** When agreement was finally reached, had BMI gotten  
[23] everything that it wanted from these negotiations?  
[24] **A.** I think it was a give and take on both parts, so I think it  
[25] was a negotiation that was finalized and I think we got what we

[1] could.  
[2] **Q.** Was the rate, you mentioned a rate court case before. Was  
[3] the rate court case actually pending at the time that final  
[4] agreement was reached?  
[5] **A.** Yes, it was.  
[6] **Q.** And did BMI want to litigate this rate in rate court?  
[7] **A.** Absolutely not.  
[8] **Q.** Why not?  
[9] **A.** The cost of litigation, you know, in considering how long  
[10] the last one had taken, we thought if we could come up with a  
[11] good blanket rate going forward it would be in everybody's best  
[12] interest.  
[13] **Q.** If you could take a look at the -- we'll come back to this  
[14] in a minute. If you could take a look at the next document  
[15] which is at tab five of your binder, and it's Joint Exhibit  
[16] 1234. Could you look at that and identify it, please?  
[17] **A.** It's the agreement in principle between BMI and Muzak.  
[18] **Q.** And what's the date of this agreement in principle?  
[19] **A.** It's August 2, 2004.  
[20] **Q.** So what's the difference between this document and the  
[21] agreement that we were just looking at?  
[22] **A.** We had finalized discussions in July of 2004 and this was  
[23] just to document where we thought the agreement was going, but  
[24] the final document was the one that was in tab 4.  
[25] **Q.** And did any of the terms change materially between the

[1] agreement in principle in August '04 and the final document in  
[2] December of '04?  
[3] **A.** No.  
[4] **Q.** If you could look specifically at page 3 of the agreement,  
[5] and the first full bullet point there is titled possible  
[6] initial added adjustment of 30 million base blanket license  
[7] fee. Do you see that?  
[8] **A.** Yes, I do.  
[9] **Q.** Could you read the first sentence under that bullet point  
[10] please?  
[11] **A.** "The base license agreement for Muzak LLC is based on  
[12] Muzak's representation that as of December 31, 2003, Muzak LLC  
[13] had a total of not more than 165,000 locations receiving its  
[14] background music service."  
[15] **Q.** And was this representation an important part of the  
[16] agreement for you?  
[17] **A.** Absolutely.  
[18] **Q.** Why?  
[19] **A.** Well, we were going to take this agreement and create a  
[20] form agreement for the rest of the industry, and we needed a  
[21] representation as to how to come up with a per location rate.  
[22] **Q.** Did BMI have an audit right on that representation of  
[23] 165,000?  
[24] **A.** Yes, we did. It's mentioned in the next sentence.  
[25] **Q.** Did BMI actually conduct an audit?

[1] **A.** Yes.  
[2] **Q.** Do you recall the results of that audit?  
[3] **A.** It was equal to the 165,000 locations.  
[4] **Q.** Now, you mentioned before the date of this document is  
[5] August 2004. Why did BMI accept the representation of number  
[6] of locations as of December 2003 as it states in this document?  
[7] **A.** I think the biggest reason was the fact that that was the  
[8] last full year that Muzak had as the formal number that they  
[9] had.  
[10] **Q.** And the title of this bullet point that we just looked at  
[11] is possible initial adjustment of \$30 million base blanket  
[12] license fee. Could you explain what that initial adjustment  
[13] was or would have been?  
[14] **A.** Well, if you continue reading down to the portion of that  
[15] paragraph, it talks about the fact if there was a  
[16] representation, if the representation of 165,000 wasn't correct  
[17] and it were higher, we were then able to go back and adjust the  
[18] \$30 million based on the number that we found. It would  
[19] increase the amount they pay us.  
[20] **Q.** And if it had been more than 165,000, how much would Muzak  
[21] have paid for any locations above that?  
[22] **A.** \$36.36.  
[23] **Q.** If you could take a look at the next tab.  
[24] **A.** Six?  
[25] **Q.** Tab six, thank you, yes. Which is Respondent's Exhibit

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- [1] 0050. If you could identify that, please?
- [2] **A.** It's an e-mail to me from Theresa Stafford Scherer.
- [3] **Q.** Who is Ms. Stafford Scherer?
- [4] **A.** She's the senior director who handles this marketplace.
- [5] **MR. FITZPATRICK:** I would move this document's
- [6] admission, your Honor?
- [7] **MR. MARKS:** No objection.
- [8] **THE COURT:** Received.
- [9] (Respondent's Exhibit RX 0050 received in evidence)
- [10] **Q.** And can you explain what Ms. Stafford Scherer is doing for
- [11] you in this e-mail?
- [12] **A.** She was actually taking numbers that she had pulled from
- [13] the system, from the BMI computer system, trying to calculate
- [14] based on the old agreement we only were getting reports that
- [15] showed the on-premise locations. We were getting the gross
- [16] billing figures for the off-premise locations. So what she was
- [17] attempting to do, based on some numbers that she had found out
- [18] how much they would be selling the service per month, she
- [19] averaged it out to be about \$600 per year for the off-premise
- [20] and she divided that into the gross billings and came up with
- [21] these estimated numbers.
- [22] **Q.** What was your view of the accuracy of these numbers?
- [23] **A.** Well, again, these were just her estimate. They weren't
- [24] based on anything lower than what she could calculate. We in
- [25] the meantime were still talking about Muzak and they had

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- [1] already given us the representation of 165,000.
- [2] **Q.** So did you rely on the numbers contained in respondent's
- [3] 0050 when you reached agreement with Muzak?
- [4] **A.** No.
- [5] **Q.** What did you rely on for the number of locations that Muzak
- [6] had?
- [7] **A.** The actual numbers from Muzak.
- [8] **Q.** If you could take a look at tab 7? And that is Joint
- [9] Exhibit 0745. If you could take a look at that and identify
- [10] it, please?
- [11] **A.** It's an analysis done comparing a proposal from Muzak in
- [12] June of 2004 and July 2004.
- [13] **Q.** So does this come before or after in time the document we
- [14] just saw from Ms. Stafford Scherer?
- [15] **A.** After.
- [16] **Q.** And I'm sorry, did you mention who created this document?
- [17] **A.** No. It was created by Jose Gonzalez.
- [18] **Q.** Who is he?
- [19] **A.** He's the vice president of operations and analysis in the
- [20] licensing department.
- [21] **Q.** Do you see up at the top of the document there's a heading
- [22] understandings, and then below that there's a heading called
- [23] issues. Do you see that?
- [24] **A.** Yes.
- [25] **Q.** Could you read issue number two, please?

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- [1] **A.** Confirm the number of locations approximately 165,000.
- [2] **Q.** And where did that 165,000 come from?
- [3] **A.** Muzak.
- [4] **Q.** And did you in fact confirm it?
- [5] **A.** Absolutely.
- [6] **Q.** And so to be clear, when BMI entered into its agreement
- [7] with Muzak, what was your view of the starting per location
- [8] rate that BMI was getting for Muzak?
- [9] **A.** \$36.36.
- [10] **Q.** Does Muzak have affiliates?
- [11] **A.** Yes, they do.
- [12] **Q.** And could you explain what an affiliate of Muzak is?
- [13] **A.** To my best ability. They're franchisees of Muzak and they
- [14] distribute the Muzak product. They're just not owned and
- [15] operated by Muzak LLC.
- [16] **Q.** And was a license for those affiliates being negotiated at
- [17] the same time as the negotiation, as the agreement for Muzak
- [18] corporate was being negotiated?
- [19] **A.** Yes, it was.
- [20] **Q.** If you could take a look at tab 8, which is Joint Exhibit
- [21] 0733, and identify that, please?
- [22] **A.** This is the Muzak affiliate license agreement that we
- [23] developed from the Muzak LLC agreement. This is the actual
- [24] form.
- [25] **Q.** And if you could go to page 2, paragraph 4A of that

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- [1] agreement where it says base license fee. Could you explain
- [2] how their base license fee is calculated?
- [3] **A.** It says base license fee shall mean the fee resulting from
- [4] multiplying the total number of locations serviced by Muzak
- [5] affiliate as of December 31, 2003 times \$36.36.
- [6] **MR. FITZPATRICK:** Your Honor, I'm about to switch
- [7] topics. Would this be an okay time for an afternoon break?
- [8] **THE COURT:** Yes, sure. Take a ten-minute recess.
- [9] (Recess)
- [10] **MR. FITZPATRICK:** May I proceed?
- [11] **BY MR. FITZPATRICK:**
- [12] **Q.** Mr. Annastas, if you're not already there, if we could go
- [13] to tab 4 of your binder to JX 0132, and specifically on the
- [14] third page under subparagraph B, about eight lines down there's
- [15] a sentence that starts, "Commercial subscriber locations shall
- [16] not." Do you see that sentence?
- [17] **A.** Yes, I do.
- [18] **Q.** And could you read the first part of that sentence, please?
- [19] **A.** "Commercial subscriber locations shall not under any
- [20] circumstances extend to ballrooms, discotheque, dance studios
- [21] or bowling centers."
- [22] **THE COURT:** Where is this again? I missed your
- [23] reference.
- [24] **MR. FITZPATRICK:** I apologize, your Honor. It's page
- [25] 3 of tab 4, which is Joint Exhibit 0132. So page 3 of the

[1] Muzak agreement.  
[2] **THE COURT:** Oh, back to -- yes.  
[3] **Q.** And we're on --  
[4] **THE COURT:** The letter agreement or the license  
[5] agreement?  
[6] **MR. FITZPATRICK:** The final license agreement, your  
[7] Honor.  
[8] **THE COURT:** Okay.  
[9] **MR. FITZPATRICK:** And we're on page 3 of that in  
[10] subparagraph B, about halfway through the paragraph, the  
[11] sentence that starts, "Commercial subscriber locations shall  
[12] not." Do you need it repeated, your Honor, or do you have it?  
[13] I had asked the witness to read it. Do you need it repeated or  
[14] do you have it?  
[15] **THE WITNESS:** Do you want me to repeat it?  
[16] **THE COURT:** Yes, if you want to.  
[17] **Q.** Thank you.  
[18] **A.** "Commercial subscriber locations shall not under any  
[19] circumstances extend to ballrooms, discotheques, dance studios  
[20] or bowling centers, any theme parks, skating rink or nightclub  
[21] or other location where an admission fee or cover charge is  
[22] assessed, limited to such portion of the premises from which  
[23] the event or the entertainment for which admission is charged  
[24] is intended to be observed or heard, and provided that any  
[25] other portion of such premise shall be covered by this

[1] agreement."  
[2] **Q.** And was this exclusion something that was negotiated  
[3] between BMI and Muzak?  
[4] **A.** Yes.  
[5] **Q.** What was BMI's position in that negotiation?  
[6] **A.** We have licenses with all of these, direct licenses with  
[7] all of these industries, and in our opinion it was not  
[8] considered background music, so for that purpose it wouldn't be  
[9] included in this agreement.  
[10] **Q.** And specifically with respect to the portion of the clause  
[11] related to bowling, why did BMI want to exclude bowling centers  
[12] from this agreement?  
[13] **A.** We had a negotiated agreement with the Bowling Proprietors  
[14] Association that was for all of the individual bowling centers  
[15] and they were paying us at \$16.60 per lane, I think, for each  
[16] of the bowling centers.  
[17] **Q.** Now, just to be clear, are there some bowling centers that  
[18] are grandfathered and included under this agreement?  
[19] **A.** Yes.  
[20] **Q.** Could you explain that, please?  
[21] **A.** As part of the settlement to move the agreement forward,  
[22] any of the bowling centers that were using Muzak music as  
[23] background unobtrusive music were allowed to pay, Muzak was  
[24] allowed to pay under the old, under the license agreement. But  
[25] if they wound up progressing into anything other than

[1] background music, rock and bowl, laser bowl, any of that, it  
[2] was not included in the agreement.  
[3] **Q.** Could you describe what you mean by progressing from  
[4] background music to things like rock and bowl that you  
[5] mentioned?  
[6] **A.** Bowling centers of today are no longer the bowling centers  
[7] that I grew up with, and they use music as a form of  
[8] entertainment. Now, it's a very big thing with them that music  
[9] is used in bowling centers to draw crowds, to bowl with the  
[10] music and some other forms that they use it for. Okay?  
[11] **Q.** Now, with the exception of the grandfathered bowling  
[12] centers using background music, does any commercial music  
[13] service have under a final agreement bowling centers licensed  
[14] at the \$36.36 rate?  
[15] **A.** No.  
[16] **Q.** Okay, staying on this agreement, and you can refer to the  
[17] first page, but what's the actual term of this license?  
[18] **A.** July 1, 2004 through June 30, 2009.  
[19] **Q.** Now, the Court has already heard that the decade, the ten  
[20] years prior to this agreement Muzak had been paying interim  
[21] fees at a lower level, is that correct?  
[22] **A.** Yes.  
[23] **Q.** And do you recall about what that level was?  
[24] **A.** It was between 12 and \$14.  
[25] **Q.** And was there a negotiation over the rates for that period.

[1] that was occurring simultaneously with the negotiation for the  
[2] final agreement?  
[3] **A.** Yes.  
[4] **Q.** What was BMI's position in the negotiations with respect to  
[5] the period, the retroactive period?  
[6] **A.** We had been seeking retroactive monies for that period, and  
[7] we had a rate that we were looking for going forward and we had  
[8] a retroactive settlement that we were looking for.  
[9] **Q.** And what was Muzak's position with respect to the  
[10] retroactive period?  
[11] **A.** They felt that they wouldn't pay anything retroactively.  
[12] **Q.** And in the end, what happened?  
[13] **A.** We finalized a fee on the interim basis, the rate they paid  
[14] us on the interim basis.  
[15] **Q.** And why did you agree to that?  
[16] **A.** For a whole lot of reasons. It had taken ten years to get  
[17] to this point. Also at the same time we were looking at a  
[18] pending rate court action, and I think everybody knows that  
[19] rate court actions here today are going to cost us a lot of  
[20] money, so the amount we were looking retroactively would have  
[21] been spent probably coming to rate court.  
[22] **Q.** If you could, I apologize to jump around, but if you could  
[23] go to tab 5?  
[24] **A.** Tab 5.  
[25] **Q.** Tab 5, JX 1234 which is the August 2004 agreement in

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[1] principle. And specifically, if you could take a look at page  
[2] 2 where it talks about the base license fees. Do you see that?  
[3] **A.** Yes.  
[4] **Q.** And in the -- if you could take a look at the first  
[5] indented bullet point there under base license fee, for the  
[6] period July 4 through June 2005. What was the license fee  
[7] under this agreement?  
[8] **A.** The sum of \$6 million will be payable in advance per  
[9] quarter on or before the following dates. So it was \$6 million  
[10] per year.  
[11] **Q.** In your mind was any of that \$6 million actually for a  
[12] period prior to July 1, 2004 to June 30, 2005?  
[13] **A.** No.  
[14] **Q.** Does it say anywhere in the agreement that it was really  
[15] for a prior period?  
[16] **A.** No, it doesn't.  
[17] **Q.** And we don't have to go one by one, but for the next four  
[18] bullet points, what does it say in the agreement that the  
[19] license fee is for each of the contract years '05 to '06, '06  
[20] to '07, '07 to '08 and '08 to '09?  
[21] **A.** It's all \$6 million for those periods.  
[22] **Q.** In your mind were any of those \$6 million amounts actually  
[23] for past periods?  
[24] **A.** No.  
[25] **Q.** Does it say anywhere in the agreement that any of those

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[1] **A.** The license term will be July 1, 2004 through June 30,  
[2] 2009.  
[3] **Q.** So does, using that definition, does the bullet point you  
[4] just read on page 9 square with your understanding of the  
[5] agreement?  
[6] **A.** Yes.  
[7] **Q.** Could you explain that?  
[8] **A.** We had negotiated an agreement going forward, and again,  
[9] any retroactivity had been paid to us was finalized at those  
[10] existing fees so. July 1, 2004 through June 30 of 2009, they  
[11] were paying those \$6 million annually.  
[12] **Q.** If you could go to the, back to tab 4 to the final  
[13] agreement, I just want to ask you whether a similar term was  
[14] incorporated into the final agreement as well between BMI and  
[15] Muzak.  
[16] **A.** Tab 4, what page?  
[17] **Q.** Page 1.  
[18] **A.** Okay.  
[19] **Q.** Could you read the fifth whereas clause, the last whereas  
[20] clause on the first page?  
[21] **A.** "Whereas Muzak and BMI agree that the license fees to be  
[22] paid by Muzak to BMI under this license agreement for the term  
[23] are reasonable for the rights granted."  
[24] **Q.** And again, what's the term in the final agreement?  
[25] **A.** The term is July 1, 2004 through June 30, 2009.

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[1] dollar amounts actually were for past periods?  
[2] **A.** No.  
[3] **Q.** If you could turn to page 6 of the agreement, letter  
[4] agreement, to be clear. And if you could look at the last  
[5] bullet point, what does the letter agreement actually say about  
[6] the past period?  
[7] **A.** The license fees and terms for periods prior to July 1,  
[8] 2004 are deemed final and not subject to adjustment. Want me  
[9] to continue reading to the next page?  
[10] **Q.** No, that's not necessary. Thank you.  
[11] **THE COURT:** Where was that?  
[12] **THE WITNESS:** Page 6. The very last bullet point.  
[13] **Q.** As part of the negotiations with Muzak, did Muzak ever say  
[14] that any of those \$6 million amounts were actually for past  
[15] periods to you?  
[16] **A.** No.  
[17] **Q.** Could you turn to page 9 of the letter agreement? And if  
[18] you, on page 9, if you could read the first, that non-indented  
[19] bullet point, please.  
[20] **A.** "Muzak LLC, Muzak affiliates and BMI agree that the license  
[21] fees for the term are reasonable."  
[22] **Q.** And if you could just quickly go to page 1.  
[23] **A.** Back to page 1?  
[24] **Q.** It uses the word "term." What is the term as defined in  
[25] this agreement?

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[1] **MR. MARKS:** Your Honor, excuse me. I wish to object  
[2] to the last question on the grounds that he's reading from the  
[3] whereas clauses which are not part of the --  
[4] **THE COURT:** I can't hear you. On the grounds that  
[5] what?  
[6] **MR. MARKS:** That the question asked if it was a part  
[7] of the agreement and the portion Mr. Annastas read was from a  
[8] whereas clause, which is not actually part of the agreement  
[9] itself.  
[10] **THE COURT:** Your point is noted. It's merely a  
[11] recital.  
[12] **BY MR. FITZPATRICK:**  
[13] **Q.** Mr. Annastas, when BMI received the license fees for Muzak,  
[14] do you have an understanding of how they were distributed to  
[15] BMI affiliates?  
[16] **A.** All the payments that came in on an annual basis were paid  
[17] prospectively.  
[18] **Q.** Were any of the fees that BMI received under this Muzak  
[19] agreement distributed for performances in the past prior to the  
[20] beginning of the agreement?  
[21] **A.** No. No retroactivity was sent back to the distribution  
[22] system.  
[23] (Continued next page)  
[24]  
[25]

[1] **BY MR. FITZPATRICK:**

[2] **Q.** Mr. Annastas, could please turn now to tab 9 in the binder  
[3] which is Joint Exhibit 1257? Would you identify that, please?

[4] **A.** It is a chart of all the commercial music service licensees  
[5] that we had and there is approximately 7 columns: The first  
[6] column talks about status; the second, affiliation; third,  
[7] licensing; fourth, state; fifth, account number; the next one  
[8] is settled periods; the next one is start date prior to January  
[9] '94. And then the last column says start date not prior to  
[10] January of 1994.

[11] **Q.** Now, when BMI offered license terms to the rest of the  
[12] industry after it reached agreement with Muzak, how did BMI  
[13] treat past periods?

[14] **A.** All the interim payments were finalized as is.

[15] **Q.** Were there some commercial music service licensees that  
[16] didn't have 10 years of retroactivity with BMI?

[17] **A.** Absolutely.

[18] **Q.** And did BMI treat them any differently?

[19] **A.** No. Whatever the period that they started the license with  
[20] us, that was, if it was prior to 2004, even if it was two years  
[21] it was considered settled and paid in full.

[22] **Q.** And were there any adjustments to the \$36.36 rate for  
[23] licensees that had less than 10 years of retroactivity?

[24] **A.** No.

[25] **Q.** Why not?

[1] **A.** Because the fees were set at \$36.36 prospectively July 1,  
[2] 2004.

[3] **Q.** Back to Joint Exhibit 1257 on tab 9, could you explain what  
[4] it means -- what the settled periods column means? First, if  
[5] you have a "no" in that column what does that mean?

[6] **A.** The first category of noes are all those that started their  
[7] license with us after 1994 so there was no reason to settle.  
[8] The first example is right on top, the license agreement  
[9] started January 1, 2006, and you can continue all the way down  
[10] to one of the last noes it started May 1st, 2008.

[11] **Q.** So, for all of those that have "no" in the settled column,  
[12] did they have any retroactive period to settle at all?

[13] **A.** No.

[14] **Q.** Now, if you have a row that has "yes" in the settled period  
[15] and "yes" in the start date prior to January 1994, what does  
[16] that mean?

[17] **A.** It meant that they had been with, licensed with us prior to  
[18] that period of time.

[19] **Q.** And if you have got two yeses and no date, how long a  
[20] retroactive period did they have?

[21] **A.** It would have been from 1994.

[22] **Q.** The full 10 years?

[23] **A.** The full 10 years.

[24] **Q.** And if you have got a yes and then a blank and then a date,  
[25] what does that mean?

[1] **A.** Well, any one of those examples would show that one started  
[2] in January 1st, 2000, so they only started licensing us from  
[3] January 1st, 2000, so the retroactivity that they would have  
[4] owed us was also settled from that period.

[5] **Q.** And for those people is that the full 10 years or is that  
[6] less than 10 years?

[7] **A.** Less than 10 years.

[8] **Q.** And, again, for any of those people was there any  
[9] adjustment made to the \$36.36 rate?

[10] **A.** No.

[11] **Q.** Now, again, the Court has heard about this so I won't ask  
[12] you to describe it in detail, but are you familiar with the 8  
[13] percent organic growth provision that's in BMI's commercial  
[14] music services agreement?

[15] **A.** Yes.

[16] **Q.** When you, Mr. Annastas, negotiated or participated in the  
[17] negotiations with Muzak over the agreement, did you have any  
[18] expectations about whether Muzak's number of locations would  
[19] change over the course of the agreement?

[20] **A.** Part of the representations they had made to us was that  
[21] they had some growth.

[22] **MR. MARKS:** Your Honor, I would object on hearsay  
[23] grounds.

[24] **THE COURT:** Frankly, I couldn't hear the answer.

[25] **Q.** My question, Mr. Annastas, is whether you had any

[1] expectations at the time that you negotiated the deal with  
[2] Muzak, did you have any expectation as to whether Muzak's  
[3] number of locations would change over time?

[4] **A.** Yes, I did.

[5] **Q.** And could you tell me what those expectations were?

[6] **A.** They would have been minimal.

[7] **Q.** Minimal what?

[8] **A.** Minimal growth.

[9] **Q.** If you can take a look at tab 7 in your binder which,  
[10] again, is joint Exhibit 0745 and, again, back up to the Section  
[11] issues where we were before?

[12] **A.** Yes.

[13] **Q.** Could you take a look at issue 6 and read that, please?

[14] **A.** When Muzak quoted the 2.5 percent to 3.0 percent average  
[15] annual growth, did that include both organic and affiliated  
[16] locations.

[17] **Q.** And what is that 2.5 to 3 percent average annual growth  
[18] that's referred to in issue 6?

[19] **A.** It was a quote that Muzak had made to us stating that  
[20] that's what their average growth had been.

[21] **Q.** Is that a number that you considered --

[22] **MR. MARKS:** Objection, your Honor. I object to this  
[23] witness offering -- it is rank hearsay testimony for him to  
[24] testify about what Muzak said to him.

[25] **MR. FITZPATRICK:** First of all, your Honor, this is a

[1] Joint -- he is reading from a Joint Exhibit; but second of all  
 [2] he clearly, these are things he could take into account in his  
 [3] negotiation. So, regardless of whether in fact that was the  
 [4] growth. If this was what he was considering, it is relevant.

[5] **THE COURT:** Overruled.

[6] **MR. LARSON:** I apologize. Could I hear the last  
 [7] answer before the objection? I want to make sure I have the  
 [8] question.

[9] (Record read)

[10] **BY MR. FITZPATRICK:**

[11] **Q.** Was that something, was the quote that's referenced in  
 [12] number 6 there something that you considered when you were  
 [13] reaching final agreement with Muzak?

[14] **A.** Yes.

[15] **MR. FITZPATRICK:** Pardon me, your Honor. May I take a  
 [16] moment?

[17] Your Honor, we have an issue with a missing page. I  
 [18] thought that my exhibit was two pages and it is only one. So,  
 [19] I will move on and we will try to -- we will try to remedy  
 [20] that. If I could, I will try to remedy it in the meantime and  
 [21] we can address it on redirect if that's acceptable so as not to  
 [22] hold up the examination.

[23] So, back to tab 7, issue number 6. After that 2.5 to  
 [24] 3 percent figure the question asks when Muzak quoted that  
 [25] figure, annual growth, did that include both organic and

[1] affiliated locations?

[2] Could you explain what the reference to organic and  
 [3] affiliated locations is?

[4] **A.** Organic was considered new business and their referral to  
 [5] us. And affiliated was they were buying franchisees in the  
 [6] past few years.

[7] **Q.** And, did organic and affiliated growth end up being treated  
 [8] differently under the final Muzak agreement?

[9] **A.** Yes, it does.

[10] **Q.** Would you just briefly explain that?

[11] **A.** The organic growth has the 8 percent growth rate and the  
 [12] acquired fee is the, if they purchased a location, a business,  
 [13] it was paid to us at the same rate as that business was paying  
 [14] us.

[15] **Q.** Now, we've been talking about Muzak. Did the commercial  
 [16] music services agreement that BMI offered to the rest of the  
 [17] industry also have an 8 percent organic growth provision?

[18] **A.** Yes.

[19] **Q.** And, did you have any expectations as to whether the number  
 [20] of locations served by the entire industry rather than Muzak in  
 [21] particular would change during the 2004 to 2009 period?

[22] **A.** I think from my perspective, you know, looking at where the  
 [23] industry had been at the time, there were a lot of new  
 [24] technologies and new services being offered. They had the  
 [25] introduction of XM, Sirius, and the iPod that was introduced.

[1] And being a very competitive marketplace I didn't see much  
 [2] growth happening. I think Mike had paraphrased before when he  
 [3] said that it was cannibalized so we were buying each other's  
 [4] locations.

[5] **Q.** What effect -- you mentioned XM, Sirius and iPod; how did  
 [6] they factor into your expectations about number of locations  
 [7] served by the commercial music services industry?

[8] **A.** Well, as more businesses were telling us that they were  
 [9] using iPods that meant that they weren't going to be using a  
 [10] background music service to provide their music, they provide  
 [11] their own. XM and Sirius has been introduced to the  
 [12] marketplace and they were offered a license separate from the  
 [13] background music service industry.

[14] **Q.** And what are XM and Sirius?

[15] **A.** They're the satellite radio.

[16] **Q.** So, given the expectations you just described, did you have  
 [17] any expectations as to what would happen to the effect of per  
 [18] location commercial music services rate across the industry  
 [19] over the course of the agreement?

[20] **A.** Well, I didn't see it changing much because of the fact  
 [21] that as an industry I didn't see the overall locations growing.

[22] **Q.** And so now that we are in 2010 have you looked back at what  
 [23] actually did happen?

[24] **A.** Yes.

[25] **Q.** And what happened?

[1] **A.** For once I may have been right but it wound up being that  
 [2] the average number of locations hasn't changed, overall, within  
 [3] the industry.

[4] **MR. FITZPATRICK:** I pass the witness, your Honor.

[5] **CROSS EXAMINATION**

[6] **BY MR. MARKS:**

[7] **Q.** Good afternoon, Mr. Annastas.

[8] BMI has approximately 70,000 different licensees that  
 [9] fall under general licensing, is that correct?

[10] **A.** Yes.

[11] **Q.** And I think you testified earlier today that that covers  
 [12] about 100,000 customer locations?

[13] **A.** Yes.

[14] **Q.** And DMX provides 70,000 customer locations, approximately,  
 [15] by itself; is that correct?

[16] **A.** Yes, they do.

[17] **Q.** The licensing and commercial music services such as DMX,  
 [18] Play Network and TruSonic are covered by general licensing at  
 [19] BMI?

[20] **A.** Yes, they are.

[21] **Q.** And the license that BMI offers to commercial music service  
 [22] is a through to the audience license, correct?

[23] **A.** Yes.

[24] **Q.** That means that customers of a commercial music service do  
 [25] not need to take a separate performance rights license to

[1] perform BMI music when they play the music provided by the  
[2] music service at their locations; correct?  
[3] **A.** If that's the only music they're playing, no, they don't.  
[4] **Q.** Are you familiar with the terms background music and  
[5] foreground music?  
[6] **A.** Yes.  
[7] **Q.** The license that a commercial music service obtains from  
[8] BMI does not distinguish between background music uses and  
[9] foreground music uses, correct?  
[10] **A.** No, it doesn't.  
[11] **Q.** BMI makes no distinction in any of its licenses as to  
[12] whether the music used has lyrics versus an instrumental  
[13] version of the song, correct?  
[14] **A.** You are talking about the background, commercial music  
[15] services.  
[16] **Q.** Talking about any license offered in the general department  
[17] of BMI.  
[18] **A.** Yes, it does. It does distinguish.  
[19] As I pointed out in the restaurant license, it talks  
[20] about whether or not there is multiple instrumentalists under  
[21] the live music category so, yes, there is distinction between  
[22] live music and recorded music.  
[23] **Q.** I will try to sharpen my question because I think there is  
[24] some confusion. I'm not distinguishing between live music and  
[25] recorded music.

[1] **A.** Okay.  
[2] **Q.** But, within recorded music is there any distinction drawn  
[3] between recorded music that has the vocals or the lyrics to the  
[4] song as opposed to just an instrumental version of the song?  
[5] **A.** No. But if you have karaoke it is distinguished. And I'm  
[6] just trying to understand where you are coming from, Ben, so.  
[7] **Q.** I understand. Let's just stick within the recorded music  
[8] category, not karaoke, just recorded music whether it is played  
[9] by a restaurant, a hotel, or a commercial music service.  
[10] **A.** Okay.  
[11] **Q.** There is no distinction in any of those licenses as to  
[12] whether or not it is an instrumental version of the song or a  
[13] version of the song with a singer singing lyrics, correct?  
[14] **A.** No, it is not.  
[15] **Q.** BMI employs business development personnel to identify  
[16] potential licensees that may be using BMI music without a  
[17] license, correct?  
[18] **A.** Yes.  
[19] **Q.** There are approximately 30 people within the general  
[20] licensing department employed primarily for that purpose,  
[21] correct?  
[22] **A.** Just that area, yes.  
[23] **Q.** And, overall, the general licensing department has  
[24] approximately a hundred employees, correct?  
[25] **A.** Yes.

[1] **Q.** And once the business development groups identifies a  
[2] potential licensee, information about that business is  
[3] transferred over to the sales group, correct?  
[4] **A.** Absolutely.  
[5] **Q.** And the sales group contacts potential licensees and  
[6] attempts to have them sign the appropriate form license,  
[7] correct?  
[8] **A.** Yes.  
[9] **Q.** There are approximately 40 people within the sales function  
[10] in the general licensing department, correct?  
[11] **A.** Yes, there are.  
[12] **Q.** And if a sales group is unable to secure agreement to the  
[13] form license from the potential licensee, the matter will be  
[14] referred to another group that will start talking with the  
[15] potential licensee about legal matters and copyright  
[16] infringement, correct?  
[17] **A.** Yes.  
[18] **Q.** At some point in the absence of a license agreement BMI  
[19] will send a cease and desist letter, correct?  
[20] **A.** Yes.  
[21] **Q.** And if the potential licensee still doesn't take a license  
[22] BMI will sue them, correct?  
[23] **A.** Yes.  
[24] **Q.** Enforcement actions, as I think you mentioned earlier, can  
[25] be costly and time consuming, correct?

[1] **A.** Yes.  
[2] **Q.** BMI would prefer to avoid bringing copyright enforcement  
[3] actions if it can?  
[4] **A.** Absolutely.  
[5] **Q.** Even with the ongoing efforts that BMI devotes to music  
[6] licensing businesses that fall within the general licensing  
[7] category, there are likely many businesses that are using music  
[8] that do not currently have a BMI license, correct?  
[9] **A.** Yes.  
[10] **Q.** I would like to show the witness Joint Exhibit 1215.  
[11] Mr. Annastas, this is the form license that BMI  
[12] offered to the background music industry for the time period  
[13] from 1987 to 1993, correct?  
[14] **A.** Yes.  
[15] **Q.** This is the license that you were referring to earlier that  
[16] generated rates of approximately \$12 to \$14 per location to  
[17] BMI?  
[18] **A.** On average, yes.  
[19] **Q.** And this form license was the result of negotiations  
[20] between BMI and members of the commercial music service  
[21] industry, correct?  
[22] **A.** Yes.  
[23] **Q.** Including negotiations as to fees?  
[24] **A.** Yes.  
[25] **Q.** Marvin Berenson was the primary negotiator of this form,

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[1] correct?

[2] A. Yes.

[3] Q. You are generally familiar with this license from your role

[4] as vice president of general licensing during the period --

[5] during in which it was in effect, correct?

[6] A. Yes.

[7] Q. During the term of this agreement a hotel that took the

[8] then operative hotel form license from BMI would pay

[9] substantially more than \$12 to \$14 per hotel location, correct?

[10] A. Yes.

[11] Q. And a restaurant operating under the then operative

[12] restaurant form license agreement at that time paid

[13] substantially more than \$12 to \$14 per restaurant location,

[14] correct?

[15] A. Yes.

[16] Q. That's true of each of the industries that might have been

[17] covered under the form license, correct?

[18] A. Absolutely.

[19] Q. Certain types of premises were expressly included from the

[20] scope of the through to the audience license, correct?

[21] A. Yes.

[22] Q. And the exclusions are set forth in paragraph 2B on the

[23] first page of this agreement, correct?

[24] A. Yes, they are.

[25] Q. And discotheques and dance studios, for example, were

[1] A. Yes.

[2] Q. I asked you in reference to this agreement: It did not

[3] contain an exclusion for bowling centers, correct? And you

[4] responded no.

[5] Do you recall that?

[6] A. I guess so, yes.

[7] Q. It is your understanding that today ASCAP does not exclude

[8] bowling center from the scope of its licenses to commercial

[9] music services, correct?

[10] A. Yes.

[11] Q. I would like to show the witness a document that's been

[12] marked as Petitioner's Exhibit 11. This document contains

[13] Marvin Berenson's notes of a meeting that you and he had with

[14] representatives of Muzak on July 9th, 2002, correct?

[15] A. Yes.

[16] Q. You received a copy of these notes shortly after

[17] Mr. Berenson prepared them, correct?

[18] A. Yes.

[19] Q. At the time of this meeting the most recent proposal

[20] exchanged between the parties was BMI's proposal that Muzak pay

[21] \$32.50 per location going forward; correct?

[22] A. I'm assuming. I don't remember all the dates and so forth

[23] but I'm assuming you're right.

[24] Q. I can direct your attention to the second page of the

[25] document and see if it refreshes your recollection.

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[1] excluded?

[2] A. Yes, they were.

[3] Q. The license did not contain an exclusion for bowling

[4] centers?

[5] A. Not specifically.

[6] Q. Is there any other way in which it contained an exclusion

[7] for bowling centers?

[8] A. Well, there are other things that we considered and this is

[9] where we took the new agreement and made more specific

[10] exclusions. But, if you go above that it talks about it is

[11] understood that such subscription music services are intended

[12] to be used as accompanying routine activities, including but

[13] not limited to working, shopping, conversation, dining and

[14] relaxation, as long as such music is not offered to subscribers

[15] as an accompany to dancing or to serve as an adjunct to any

[16] other physical activity or form of entertainment.

[17] Q. Between 1987 and 1993 BMI treated bowling centers as within

[18] the scope of this license agreement, correct?

[19] A. I really couldn't tell you specifically that we did or

[20] didn't. When I came into the department we didn't.

[21] Q. When did you join the department?

[22] A. When I took over general licensing in '87.

[23] Q. Do you recall being deposed in this case?

[24] A. Yes.

[25] Q. You told the truth that day?

[1] A. It is on the back? Okay. I didn't see it was on the other

[2] side.

[3] Yes.

[4] Q. Does that refresh your recollection that at the time of

[5] this meeting BMI's last proposal had been \$32.50 per location?

[6] A. Yes.

[7] Q. And during this meeting Muzak expressed its preference for

[8] a flat license fee rather than a per location fee, correct?

[9] A. Yes.

[10] Q. And BMI, in turn, expressed its preference for a per

[11] location fee rather than a flat fee, correct?

[12] A. Yes.

[13] Q. And one of the reasons that BMI wanted Muzak to pay a

[14] per-location rate was that if Muzak increased its number of

[15] locations BMI would be able to earn additional license fees

[16] under a per-location structure but would not receive additional

[17] fees under a flat fee structure, correct?

[18] A. If that's what this says. I haven't read it line by line.

[19] Q. I'm asking you what your recollection was.

[20] A. My -- again, going back to the time of that negotiation, it

[21] was possible.

[22] Q. Let me read to you some of your deposition testimony and

[23] see if that refreshes your recollection.

[24] A. Perfect.

[25] Q. I asked you the questions, this is at page 139 of your

[1] deposition, if we can call it up if that would be helpful, I  
[2] asked you the question: Was one of the reasons that if Muzak  
[3] increased its number of locations, BMI would be able to earn  
[4] additional license fees under a per-location rate structure and  
[5] would not under a flat rate structure?  
[6] And your answer was: Well, obviously yes.  
[7] And I asked you: That was one of the things that you  
[8] talked about within BMI?  
[9] And your answer was: Yes.  
[10] Does that refresh your recollection?  
[11] A. Yes.  
[12] Q. That that was in fact one of the reasons and that not only  
[13] that, that was one of the reasons that you discussed internally  
[14] at BMI?  
[15] A. Yes.  
[16] Q. The parties also discussed the issue of retroactive  
[17] payments for the 1994 to 2002 period during this meeting,  
[18] correct?  
[19] A. This one, yes.  
[20] Q. BMI wanted Muzak to make a retroactive payment above the  
[21] interim fees already paid, correct?  
[22] A. Correct.  
[23] Q. And Muzak's position in this face to face negotiation was  
[24] that they did not want to make a retroactive payment, correct?  
[25] A. Yes.

[1] Q. Muzak didn't ask BMI in this meeting to return some of the  
[2] interim fees as part of a final fee agreement, did it?  
[3] A. Say that again?  
[4] Q. BMI wasn't asking for money -- excuse me.  
[5] Muzak wasn't asking for money back on the interim fees  
[6] as part of these negotiations, were they?  
[7] A. No.  
[8] Q. In this time frame Muzak had already offered to pay an  
[9] amount higher than their interim fee rates, correct?  
[10] A. Yes.  
[11] Q. And the \$32.50 per location rate that BMI offered to accept  
[12] here provided that Muzak paid retroactive fees for the period  
[13] back to 1994 is less than the rate that Muzak ultimately agreed  
[14] to pay at the start of the 2004 license which did not have a  
[15] retroactive fee component, correct?  
[16] A. Say that again?  
[17] Q. Sure.  
[18] A. Sorry.  
[19] Q. The \$32.50 per location that BMI was offering to accept  
[20] from Muzak --  
[21] A. Right.  
[22] Q. -- as long as Muzak paid a retroactive fee component --  
[23] A. Right.  
[24] Q. -- is less than the per-location rate ascribed to the  
[25] license Muzak signed and agreed to pay in 2004 without a

[1] retroactive fee component, correct?  
[2] A. The per-location rate was higher than the \$32.50. \$36.36  
[3] is higher than \$32.50.  
[4] Q. I would like to show the witness Joint Exhibit 759.  
[5] MR. FITZPATRICK: Can I move in this document?  
[6] MR. MARKS: Sure. We jointly --  
[7] MR. FITZPATRICK: Either way.  
[8] MR. MARKS: We jointly move the admission of this  
[9] document into evidence.  
[10] THE COURT: Received. PX.  
[11] (Petitioner's Exhibit PX 11 received in evidence)  
[12] BY MR. MARKS:  
[13] Q. Mr. Annastas, Joint Exhibit 759 is a license proposal that  
[14] Muzak sent to BMI on or about April 4th, 2003, correct?  
[15] A. Yes.  
[16] Q. In this proposal Muzak was still proposing annual  
[17] enterprise-wide fees rather than per-location fees for each  
[18] year of the license going forward, correct?  
[19] A. Yes.  
[20] Q. And Muzak was proposing that fees paid at the interim rate  
[21] from 1994 to 2002 be made final at that interim rate, correct?  
[22] A. That's what it says.  
[23] Q. And the amount that Muzak offered in April 2003 to pay for  
[24] the calendar year 2003 was more than the interim fee rate,  
[25] correct?

[1] A. Yes.  
[2] Q. And Muzak offered more to pay -- excuse me -- Muzak offered  
[3] to pay more for the calendar year 2003 than BMI ultimately  
[4] agreed to accept as final fees for 2003, correct?  
[5] A. Yes.  
[6] Q. I would like to show the witness Joint Exhibit 739.  
[7] Mr. Annastas, Joint Exhibit 739 is a letter that you  
[8] sent to Muzak's general counsel on August 20th, 2003, correct?  
[9] A. Yes.  
[10] Q. This was a counter-proposal by BMI to an offer made by  
[11] Muzak earlier that year?  
[12] A. Yes.  
[13] Q. BMI was proposing annual license fees for the 2003 to 2007  
[14] period as well as retroactive payments for the 1994 to 2002  
[15] period, correct?  
[16] A. Yes.  
[17] Q. And if the number of locations serviced by Muzak increased  
[18] Muzak would pay an additional fee, correct?  
[19] A. Yes.  
[20] Q. BMI was proposing annual payments at the bottom of the  
[21] first page as a minimum fee payment with some upside to BMI if  
[22] Muzak's number of locations increased, correct?  
[23] A. Yes.  
[24] Q. And if you look at the total annual license fees that BMI  
[25] was seeking for the five-year period from 2003 to 2007, it was

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[1] \$27 million over that five-year period if you are looking at  
 [2] the first column on the left?  
 [3] A. Okay.  
 [4] Q. Do you agree with that? You can accept my representation  
 [5] it is the math.  
 [6] A. Absolutely. Absolutely.  
 [7] Q. And that was based on an estimate of 157,000 locations,  
 [8] correct?  
 [9] A. At that time, yes.  
 [10] Q. And, for those 157,000 locations BMI was offering to accept  
 [11] a lower per-location amount at the beginning of the license  
 [12] period than the \$32.50 per location from the offer we discussed  
 [13] a moment ago in exchange for a higher per location amount at  
 [14] the end of the license, correct?  
 [15] A. Yes. This given proposal, yes.  
 [16] Q. And, in addition to the \$27 million in prospective license  
 [17] fees, BMI was seeking \$6 million as settlement for the past  
 [18] interim period, correct?  
 [19] A. Well, it is five years, it is \$5 million, isn't it?  
 [20] Q. Let me point your attention --  
 [21] A. Okay, Muzak paid \$6 million, yes.  
 [22] Q. Let's just make sure the record is clear. There is going  
 [23] to be a \$1 million up front payment as part of a \$6 million  
 [24] package for the past and the rest of the retroactive fee would  
 [25] be paid out in \$1 million increments during the term of the

[1] A. I will -- assuming your numbers are right, yes.  
 [2] Q. If we can turn to Joint Exhibit 1164? This is an analysis  
 [3] of proposals that was prepared for John Shaker in May 2004,  
 [4] correct?  
 [5] A. Yes.  
 [6] Q. And, to this point in the negotiations Muzak's position  
 [7] remained that it wanted to pay a flat fee, correct?  
 [8] A. Yes.  
 [9] Q. And BMI's position was that it wanted Muzak either to pay a  
 [10] per-location rate or a minimum fee with a per-location  
 [11] adjustment over the number of locations at the time the  
 [12] contract was signed, correct?  
 [13] A. Yes.  
 [14] Q. In the BMI proposals on the first third, fourth and fifth  
 [15] pages of this joint exhibit the proposals --  
 [16] A. Third, fourth and fifth pages you are saying?  
 [17] Q. Yes.  
 [18] A. Okay. Sorry.  
 [19] Q. The proposal is labeled BMI proposal A1, BMI proposal A,  
 [20] BMI proposal B, and BMI proposal C.  
 [21] A. Okay.  
 [22] Q. And my question is, each of these proposals under  
 [23] consideration includes a growth allowance of 2.5 percent,  
 [24] correct?  
 [25] A. Yes.

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[1] license?  
 [2] A. Yes.  
 [3] Q. I would just like to show the witness a demonstrative and  
 [4] see if I have captured this offer correctly.  
 [5] So, Mr. Annastas, if you add up the \$27 million in  
 [6] annual license fees that BMI was seeking and the \$6 million  
 [7] retroactive fees that BMI was seeking, it was a total package  
 [8] of \$33 million in total additional payments beyond what Muzak  
 [9] had already paid on interim basis to settle the 1994 through  
 [10] 2007 period, correct?  
 [11] A. At this proposal, yes.  
 [12] Q. And there was no organic growth component contemplated as  
 [13] part of this package?  
 [14] A. No.  
 [15] Q. I would like to show the witness Joint Exhibit 1164.  
 [16] Before we turn to that document, if we can go back to  
 [17] the demonstrative I have one more question on that. You will  
 [18] see that indicated in the parentheses in the second line and  
 [19] the third line there is a percentage figure. Do you see that?  
 [20] A. Yes.  
 [21] Q. I will represent to you that \$27 million is 82 percent of  
 [22] \$33 million and \$6 million is 18 percent of \$33 million. So,  
 [23] of the \$33 million in total additional payments that BMI was  
 [24] seeking for the 1994 to 2007 period, 18 percent of it was  
 [25] attributable to the retroactive component, correct?

[1] Q. And that wouldn't distinguish between organic growth or  
 [2] existing affiliate growth, correct?  
 [3] A. Yes.  
 [4] Q. And the inclusion of a 2.5 percent growth allowance in  
 [5] these proposals was an attempt to bridge the parties'  
 [6] respective positions on the license structure, correct?  
 [7] A. Yes.  
 [8] Q. And if you could turn to the proposal labeled BMI proposal  
 [9] A1, we have also got it up on the screen if that's more  
 [10] convenient for you.  
 [11] A. No, that's okay.  
 [12] Q. This proposal had a five year total for annual fees of  
 [13] \$27.5 million, correct?  
 [14] A. Yes.  
 [15] Q. And that's less than Muzak -- that's less than the \$30  
 [16] million that Muzak agreed to pay to BMI two months later for a  
 [17] five-year license, correct?  
 [18] A. Yes.  
 [19] Q. And in this proposal the fees were weighted toward the end  
 [20] of the license so that the annual fees were lower at the start  
 [21] of the license and higher at the end, correct?  
 [22] A. Yes.  
 [23] Q. This proposal also included \$5.5 million in retroactive  
 [24] fees, right?  
 [25] A. Yes.

- [1] Q. And comparing this proposal to the August 20th, 2003 offer  
[2] that we looked at a moment ago, the total payments for a  
[3] five-year license for both are \$33 million in addition to what  
[4] had already been paid for entering, correct?  
[5] A. Yes.  
[6] Q. But in the May 2004 proposal labeled A1 the annual fee  
[7] would be a little higher and the retroactive fee would be a  
[8] little lower, correct?  
[9] A. Yes.  
[10] Q. The reference in the bubble to interest on the retroactive  
[11] component was a reference to the fact that Muzak could owe  
[12] interest payments on retroactive fees, correct?  
[13] A. Yes.  
[14] Q. And the interest fees would compensate BMI for the lost  
[15] time value of money?  
[16] A. Yes.  
[17] Q. If you could turn to BMI proposal A, this proposal also had  
[18] a five-year total for annual fees of \$27.5 million, correct?  
[19] A. Yes.  
[20] Q. Still less than the \$30 million Muzak agreed to pay in  
[21] annual fees for a five-year license two months later, correct?  
[22] A. Yes.  
[23] Q. This proposal had a smaller retroactive fee component of  
[24] \$4.5 million, correct?  
[25] A. Yes, it did.

- [1] Q. So, the overall package was slightly less than BMI proposal  
[2] A1 at \$32 million in additional license fees over the period  
[3] from 1994 through 2008, correct?  
[4] A. Yes.  
[5] Q. If you could turn to BMI proposal B? This proposal had a  
[6] five-year total for annual fees of \$29.5 million, correct?  
[7] A. Yes.  
[8] Q. Still less than Muzak agreed to pay in annual fees for a  
[9] five-year license about two months later, correct?  
[10] A. Yes.  
[11] Q. This proposal had a retroactive fee component of \$5  
[12] million, right?  
[13] A. Yes.  
[14] Q. But a smaller upfront payment of retroactive fees compared  
[15] to proposals A or A1?  
[16] A. Yes.  
[17] Q. So the fees would be smaller at the start of the new  
[18] license period under this proposal but the overall fees for the  
[19] license period would be higher, correct?  
[20] A. Yes.  
[21] Q. And, finally, if you could turn to BMI proposal C? This  
[22] proposal is similar to BMI proposal B on the preceding page  
[23] except that there would be no upfront payment for retroactive  
[24] fees, correct?  
[25] A. Right.

- [1] Q. Their \$5 million for retroactive fees would be spread out  
[2] in payments of \$1 million per year during each year of the  
[3] prospective period in the license, correct?  
[4] A. Correct.  
[5] Q. I would like to show the witness another demonstrative.  
[6] I just want to make sure that we have the proposals  
[7] that BMI was considering in May of 2004 accurately depicted.  
[8] They contemplated a range of \$32 million on the low end and  
[9] \$34.5 million on the high end of total additional license  
[10] payments to BMI to cover the period 1994 through the end of  
[11] 2008, correct?  
[12] A. Yes.  
[13] Q. And of those additional payments between \$32 million and  
[14] \$34.5 million, BMI was attributing \$27.5 million to \$29.5  
[15] million of those fees to the five years going forward, correct?  
[16] A. Correct.  
[17] Q. And BMI was attributing \$4.5 to \$5.5 million above the  
[18] interim fees paid for the 1994 to 2004 period to settle the  
[19] past, correct?  
[20] A. Correct.  
[21] Q. And so the retroactive component was in between 14 and 17  
[22] percent when you take the 4.5 to 5.5 and match it up against  
[23] 32, the 34.5?  
[24] A. Correct.  
[25] Q. And these proposals included a growth allowance that was

- [1] different than the one that was ultimately agreed to, correct?  
[2] A. Correct.  
[3] Q. It had a lower growth rate but it included adding existing  
[4] affiliates?  
[5] A. Yes.  
[6] Q. Did BMI consider the 2.5 growth allowance that allowed not  
[7] only organic growth but also existing affiliate growth to be  
[8] more favorable to BMI or less favorable to BMI than the 8  
[9] percent organic growth allowance that was ultimately agreed to?  
[10] A. I have to go back to the chart then. There is another  
[11] component on this proposal that they would have to pay  
[12] additional amounts so with the two and a half percent growth  
[13] rate and inclusive they would still be paying us more money.  
[14] Q. And in these proposals, in May 2004, the retroactive fees  
[15] of between \$4.5 million to \$5.5 million, those were designed to  
[16] compensate BMI for what it felt were underpayments for the 1994  
[17] to 2004 period, correct?  
[18] A. Correct.  
[19] Q. Ms. Stafford-Scherer is a senior director of general  
[20] licensing at BMI, correct?  
[21] A. Yes, she is.  
[22] Q. She held that position in 2004?  
[23] A. Yes, she did.  
[24] Q. And she reported to you in 2004?  
[25] A. Yes, she did.

[1] **Q.** During the first half of 2004 Ms. Stafford-Scherer was  
[2] providing analyses of the number of locations that Muzak had,  
[3] correct?

[4] **A.** Yes.

[5] **Q.** She was the only employee at BMI who was providing you with  
[6] analyses of the number of locations that Muzak had, correct?

[7] **A.** Yes.

[8] **Q.** I would like to show the witness a document that's  
[9] premarked as respondent -- it is actually respondent's Exhibit  
[10] 50 and it is already in evidence. This was tab 6 in the binder  
[11] that you were shown on your direct examination.

[12] **A.** Okay.

[13] **Q.** This is an e-mail that you received from  
[14] Ms. Stafford-Scherer on June 22nd, 2004?

[15] **A.** Yes.

[16] **Q.** And Ms. Stafford-Scherer testified at her deposition -- we  
[17] will be hearing it read in -- that as of June 22nd, 2004, her  
[18] best estimate was that Muzak, at that time, had 182,686  
[19] locations. You never did a separate analysis that showed a  
[20] lower number of Muzak locations, correct?

[21] **A.** No.

[22] **Q.** Ms. Stafford-Scherer's June 22nd, 2004 estimate of the  
[23] number of Muzak locations was the best information that you had  
[24] at the time, correct?

[25] **A.** Internally, yes, but Muzak had already introduced number of

[1] **Q.** And she reported to you that that's the same methodology  
[2] that Muzak itself used for their internal analogies of how many  
[3] locations they had, correct?

[4] **A.** That's what she says here.

[5] **Q.** You never told her that her estimates were inaccurate, did  
[6] you?

[7] **A.** No. I had no reason to.

[8] **Q.** I would like to show the witness Joint Exhibit 1318.

[9] This is a chain of e-mails between you and John  
[10] Schaffer who was then BMI's senior vice president of licensing,  
[11] correct?

[12] **A.** Yes.

[13] **Q.** This chain includes an e-mail to Mr. Zendan that you had  
[14] drafted and forwarded to Mr. Schaeffer for his comments?

[15] **A.** Yes.

[16] **Q.** At this point in time, in July 2004, Muzak was still  
[17] pressing for a flat dollar fee amount without any adjustment  
[18] for changing the number of locations, correct?

[19] **A.** Yes.

[20] **Q.** At the time, July of 2004, you were concerned that a flat  
[21] fee structure for the industry would provide an unfair  
[22] advantage to services with significant growth at the expense of  
[23] services that were not growing at the same pace, correct?

[24] **A.** Yes.

[25] **Q.** You thought that such a structure that benefited services

[1] locations and into the discussions that we were having by then  
[2] by 2004.

[3] **Q.** Correct, the number of locations as of the end of 2003,  
[4] correct?

[5] **A.** Yes.

[6] **Q.** And Ms. Stafford-Scherer's e-mail to you reflects her  
[7] estimate of how many locations they had by June of 2004,  
[8] correct?

[9] **A.** It just says most recent 2004 period, 2004 reported period,  
[10] so I don't know that it is saying June that I read.

[11] **Q.** I'm pointing you to the date that she sent the e-mail to  
[12] you.

[13] **A.** Yes, the e-mail came in June but that doesn't mean that it  
[14] was all the way through June. And again, it was her  
[15] guesstimate.

[16] **Q.** And her guesstimate reflected that there had been growth in  
[17] locations from the average of 2003 to what they were showing in  
[18] 2004, correct?

[19] **A.** But, again, if you look at the off-premise and guesstimate  
[20] she was making, the estimate she was making was based on taking  
[21] the amount she assumed each location was paying to Muzak and  
[22] divided it into their gross billings that they reported to us  
[23] because they didn't report to us the actual locations on  
[24] off-premise. They only reported to us the on-premise  
[25] locations.

[1] with a high growth rate would be unfair to the other members of  
[2] the industry, correct?

[3] **A.** Yes.

[4] **Q.** If I could turn your attention to Joint Exhibit 745 which  
[5] is the top tab of the binder that you had on direct  
[6] examination. And just so the record is clear, the June 21,  
[7] 2004 proposal; was that a proposal from Muzak to BMI or a  
[8] proposal from BMI to Muzak?

[9] **A.** Muzak to BMI.

[10] **Q.** And, that was for \$30 million over five years, correct?

[11] **A.** Yes.

[12] **Q.** And that was with no -- that would be a flat fee with no  
[13] additional fees if they added locations, correct?

[14] **A.** Yes.

[15] **Q.** And, is the proposal labeled Muzak 7/2/'04 proposal, what  
[16] is the difference between the June 21, 2004 proposal and the  
[17] July 2nd, 2004 proposal by Muzak?

[18] **A.** It was another flat fee proposal but it increased from \$6  
[19] million to \$6.2 million per year.

[20] **Q.** Is it your testimony that neither of these proposals had  
[21] any kind of growth allowance or is it that the July 2nd, 2004  
[22] proposal had no adjustment for additional locations, whereas  
[23] the June 21, 2004 proposal did have a cap on growth?

[24] **A.** The -- well according to what this schedule says Muzak,  
[25] July 2nd -- of '04 proposal, no adjustment for organic growth

[1] versus prior Muzak proposal. So, the extra \$200,000 wouldn't  
[2] be inclusive of any growth.

[3] **Q.** And under the June 21, 2004 proposal description there is a  
[4] reference to incremental dollars at various allowable growth  
[5] scenarios versus 10 percent, (June '04).

[6] Do you see that?

[7] **A.** Yes.

[8] **Q.** Does that refresh your recollection that Muzak's June 21,  
[9] 2004 proposal was \$6 million a year for five years with 10  
[10] percent growth allowance?

[11] **A.** Yes.

[12] **Q.** And they provided as an alternate proposal that they pay  
[13] you more money if there were no cap on their growth, correct?

[14] **A.** Yes.

[15] **Q.** And BMI preferred not to accept more money that where Muzak  
[16] could grow without limitation, correct?

[17] **A.** Absolutely.

[18] **Q.** You didn't turn down the extra million dollars because you  
[19] thought they were declining locations, did you?

[20] **A.** No.

[21] **Q.** After the Muzak deal was finalized BMI offered a form  
[22] license based on the Muzak deal to other commercial music  
[23] services, correct?

[24] **A.** Yes.

[25] **Q.** Ms. Stafford-Scherer sent out a form letter to other

[1] commercial music services advising them that they could take  
[2] the form license based on the Muzak deal or they could continue  
[3] in the rate court, correct?

[4] **A.** Yes.

[5] **Q.** I would like to show the witness Respondent's Exhibit 157.

[6] If you could take a moment to review the letter and  
[7] let me know if this is an example of the form letter that  
[8] Ms. Stafford-Scherer was sending out to the rest of the  
[9] commercial music services industry?

[10] **A.** Yes, it was.

[11] **Q.** If the service took the form license for 2004 to 2009 BMI  
[12] would settle the period from 1994 to 2004 at the interim rates  
[13] paid, correct?

[14] **A.** Yes.

[15] **Q.** That's the approximately \$12 to \$14 per location?

[16] **A.** Correct.

[17] **Q.** If the service did not take the form license for the 2004  
[18] to 2009 period BMI would not settle the past at that rate,  
[19] correct?

[20] **A.** Correct.

[21] **Q.** BMI wanted services to know that it would continue to seek  
[22] higher fees for that 1994 to 2004 period unless they took the  
[23] prospective deal for 2004 to 2009, correct?

[24] **A.** Say that again, Ben?

[25] **Q.** BMI wanted commercial music services to know that it would

[1] continue to seek higher fees than had been paid on an interim  
[2] basis for the 1994 to 2004 period?

[3] **A.** I think we were also advising them they still had the rate  
[4] court if they wanted to go back to the rate court and if they  
[5] wanted to, you know, take that on it would be probably for  
[6] higher fees.

[7] **Q.** Correct. You were telling services if they didn't want to  
[8] take the deal you were offering going forward?

[9] **A.** Right.

[10] **Q.** They could go back to rate court and you would not only  
[11] seeks those fees going forward but you would also seek  
[12] additional payments for 1994 to 2004, correct?

[13] **A.** Yes.

[14] **Q.** The past license fee exposure was used as leverage by BMI  
[15] to get commercial music services to sign on to the new deal  
[16] going forward, right?

[17] **A.** Yes.

[18] **MR. MARKS:** Your Honor, I move the admission of this  
[19] exhibit.

[20] **MR. FITZPATRICK:** No objection, your Honor.

[21] **THE COURT:** Received.

[22] **MR. MARKS:** 157.

[23] (Respondent's Exhibit 157 received in evidence)

[24] **MR. MARKS:** Your Honor, I'm happy to keep going. I  
[25] know we are a minute away from 5:00 and I have reached a

[1] natural break point.

[2] **THE COURT:** Let's break for the day. We will resume  
[3] at 10:00 tomorrow morning.

[4] **MR. MARKS:** Thank you, your Honor.

[5] May we have the standard instruction with regard to  
[6] him not speaking?

[7] **THE COURT:** No. I'm not going to issue it every day.

[8] **MR. MARKS:** That's fine. I just wanted to be clear.  
[9] (Adjourned to 10:00 a.m., Thursday, January 21, 2010.)

January 20, 2010

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[25]

**In The Matter Of:**

*BROADCAST MUSIC INC., v.  
DMX, INC.,,*

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*CORRECTED  
January 21, 2010*

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*TRIAL  
SOUTHERN DISTRICT REPORTERS  
500 PEARL STREET  
NEW YORK., NY 10007  
212-805-0300*

**CORRECTED**

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(11) 0115bmi1  
UNITED STATES DISTRICT COURT  
(12) SOUTHERN DISTRICT OF NEW YORK  
(13) -----x  
(14) BROADCAST MUSIC INC.,  
(15) Petitioner,  
(16) v. 08 Civ. 216 (LLS)  
(17) DMX, INC.,  
(18) Respondent.  
(19) -----x  
(20) January 21, 2010  
(21) 10:15 a.m.  
(22) Before:  
(23) HON. LOUIS L. STANTON,  
(24) District Judge  
(25) APPEARANCES  
(26) HUGHES, HUBBARD & REED, LLP  
(27) Attorneys for Petitioner  
(28) BY: JAMES C. FITZPATRICK  
(29) MICHAEL E. SALZMAN  
(30) JASON C. BENTON  
(31) MARGARET J. HOAG  
(32) - AND -  
(33) JOSEPH DIMONA, In-house counsel, BMI, Inc.,  
(34) WEIL, GOTSHAL & MANGES, LLP  
(35) Attorneys for Respondent  
(36) BY: R. BRUCE RICH  
(37) BENJAMIN E. MARKS  
(38) TODD D. LAPSON  
(39)  
(40)  
(41)  
(42)  
(43)  
(44)  
(45)

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(1) correct?  
(2) A. Yes.  
(3) Q. She was the one who communicated BMI's position to  
(4) TruSonic?  
(5) A. Yes.  
(6) Q. And she was the one who communicated TruSonic's position  
(7) internally back to her colleagues at BMI, correct?  
(8) A. Yes.  
(9) Q. So, in terms of the face to face negotiations or direct  
(10) contact in the negotiations, she was the person who --  
(11) A. It was all via phone.  
(12) Q. It was all via her?  
(13) A. Via phone.  
(14) Q. Via phone; but she was the only person involved in the  
(15) phone conversations?  
(16) A. As far as I remember.  
(17) Q. You weren't personally involved?  
(18) A. No.  
(19) Q. And as Mr. O'Neill explained yesterday, TruSonic had  
(20) already grown by more than 8 percent each year between 2004 and  
(21) the time they signed the license on June 29, 2007, correct?  
(22) A. Yes.  
(23) Q. So, at the time it signed the license agreement with BMI in  
(24) 2007, TruSonic already owed additional fees for the period from  
(25) the start of the new license in July of 2004 through the middle

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(1) (Trial resumed)  
(2) THE COURT: Mr. Annastas, you are still under oath.  
(3) THE WITNESS: Yes, sir.  
(4) THE COURT: Mr. Marks.  
(5) THOMAS ANNASTAS,  
(6) called as a witness by the Petitioner,  
(7) having been duly sworn, testified as follows:  
(8) MR. MARKS: Your Honor, before I continue with the  
(9) cross-examination of Mr. Annastas, one housekeeping matter from  
(10) yesterday.  
(11) Mr. Rich examined Mr. O'Neill on respondent's Exhibit  
(12) 31 but I don't believe it's been formally received into  
(13) evidence, and at this point I would like to move its admission.  
(14) MR. FITZPATRICK: No objection, your Honor.  
(15) THE COURT: Received.  
(16) (Respondent's Exhibit 31 received in evidence)  
(17) CROSS EXAMINATION (Cont'd)  
(18) BY MR. MARKS:  
(19) Q. Mr. Annastas, I would like to turn to the BMI agreement  
(20) with TruSonic. Ms. Stafford-Scherer negotiated the agreement  
(21) on behalf of BMI, correct?  
(22) A. No, she didn't negotiate it. She actually -- she was the  
(23) point person to talk to them. When the final agreement was  
(24) done there were a few of us that were involved in it.  
(25) Q. And was the one who had the direct contact with TruSonic,

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(1) of 2007, correct?  
(2) A. Yes.  
(3) Q. TruSonic didn't agree to pay those additional fees for the  
(4) prior three years right away upon the execution of the license  
(5) agreement, correct?  
(6) A. Correct.  
(7) Q. With your approval, Ms. Stafford-Scherer negotiated a  
(8) payment plan with TruSonic that allowed TruSonic to pay BMI the  
(9) additional fees it owed for the prior three years in increments  
(10) over the remaining term of the license, correct?  
(11) A. Correct.  
(12) Q. In negotiations Ms. Stafford-Scherer made that payment plan  
(13) a little softer on the front end and a little more aggressive  
(14) on the back end?  
(15) A. If I remember correctly, yes.  
(16) Q. Let me show the witness respondent's Exhibit 63. This is  
(17) an e-mail that you received from Ms. Stafford-Scherer on June  
(18) 21st, 2007, shortly before TruSonic executed the agreement with  
(19) BMI?  
(20) A. Yes.  
(21) Q. Does this refresh your recollection that  
(22) Ms. Stafford-Scherer agreed to make the payment schedule softer  
(23) on the front end and more aggressive on the back end?  
(24) A. Yes.  
(25) MR. MARKS: I would like to move its admission into

[1] evidence.  
[2] **MR. FITZPATRICK:** No objection, your Honor.  
[3] **THE COURT:** Received.  
[4] **MR. MARKS:** Respondent's Exhibit 63.  
[5] (Respondent's Exhibit 63 received in evidence)  
[6] **BY MR. MARKS:**  
[7] **Q.** TruSonic didn't have to pay interest on the prior three  
[8] years' fees that were turned into a payment plan going forward?  
[9] **A.** No. Not that I'm aware.  
[10] **Q.** If ms. Stafford-Scherer testified that there was no payment  
[11] associated you would have no reason to disagree, correct?  
[12] **A.** No.  
[13] **Q.** And allowing TruSonic to pay for the past in incremental  
[14] interest free installments going forward was done as an  
[15] accommodation to TruSonic, correct?  
[16] **A.** Yes.  
[17] **Q.** If you could turn to tab 3 in your binder which is joint  
[18] Exhibit 782.  
[19] **A.** Tab 3 you said?  
[20] **Q.** Yes. This is the current form license that BMI offers to  
[21] retail establishments?  
[22] **A.** Yes.  
[23] **Q.** And this license was developed internally at BMI?  
[24] **A.** Yes.  
[25] **Q.** It was not negotiated with representative --

[1] administrative costs are lower; correct?  
[2] **A.** Yes.  
[3] **Q.** And you believe it is reasonable for BMI to provide a  
[4] volume discount?  
[5] **A.** Yes.  
[6] **Q.** When a commercial music service takes a blanket license  
[7] from BMI, BMI's administrative costs are lower than if it went  
[8] out and the licensee took the locations serviced by the  
[9] commercial music service individually, correct?  
[10] **A.** Yes.  
[11] **Q.** And, in fact, that's one of the reasons the volume of  
[12] locations that commercial music services pay a lower  
[13] per-location rate than their customers would pay if they  
[14] licensed individually with BMI, correct?  
[15] **A.** Yes. That's what I said yesterday.  
[16] **Q.** And the volume of locations covered by a commercial music  
[17] service leads to administrative efficiencies for BMI, correct?  
[18] **A.** To a degree.  
[19] **Q.** And, at all times since June 3rd, 2005, DMX has had at  
[20] least twice as many locations as Play Network, correct?  
[21] **A.** If you are saying so. I don't doubt that.  
[22] **Q.** If that's what's reflected on the chart of location counts  
[23] by, provided to DMX by BMI you would have no reason to  
[24] disagree?  
[25] **A.** No.

[1] **THE COURT:** I think we already have that in the  
[2] record.  
[3] **MR. MARKS:** Excuse me?  
[4] **THE COURT:** I think it is already clear in the record  
[5] that it was not.  
[6] **MR. MARKS:** Fine. I will move more quickly, your  
[7] Honor.  
[8] **THE COURT:** Good.  
[9] **BY MR. MARKS:**  
[10] **Q.** To your knowledge, BMI has not agreed to bury the terms of  
[11] this license for any retail establishment license?  
[12] **A.** Not that I'm aware.  
[13] **Q.** BMI resists efforts to negotiate different terms by retail  
[14] licensees, correct?  
[15] **A.** Again, anybody within the same class and category, this  
[16] would be an agreement that they would be offered.  
[17] **Q.** And you would resist efforts to negotiate different terms,  
[18] correct?  
[19] **A.** Yes.  
[20] **Q.** This retail establishment form license agreement contains a  
[21] volume discount, correct?  
[22] **A.** Yes.  
[23] **Q.** And that's because when a retailer with many locations  
[24] takes a license, BMI's administrative costs per location  
[25] compared to a retailer with a lower number of locations, BMI's

[1] **Q.** And, at all times since June 3rd DMX has had at least six  
[2] times as many locations as TruSonic, correct?  
[3] **A.** Yes.  
[4] **Q.** TruSonic is a much smaller service --  
[5] **A.** Yes.  
[6] **Q.** -- than DMX.  
[7] BMI is proposing that DMX should pay 50 percent more  
[8] than TruSonic than DMX paid in the last year of their license  
[9] even before any surcharge for the option of direct licensing,  
[10] correct?  
[11] **MR. FITZPATRICK:** I object as vague to the extent it  
[12] is not clear what metric. Are we talking about per location,  
[13] total dollars or something else, your Honor?  
[14] **BY MR. MARKS:**  
[15] **Q.** I will amend the question.  
[16] The per location rate that BMI is proposing that DMX  
[17] pay is approximately 50 percent higher than the \$24.75 paid by  
[18] TruSonic and Play Network in the final year of their license?  
[19] **A.** Yes.  
[20] **Q.** I would like to show the witness a demonstrative.  
[21] Mr. Annastas, are you familiar with a commercial music  
[22] service called GrayV?  
[23] **A.** Not really.  
[24] **Q.** Are you aware that it is a commercial music service?  
[25] **A.** If it is on the list, yes.

[1] Q. The source of your knowledge would be that if it is on  
[2] BMI's list it is --  
[3] A. Yes.  
[4] Q. -- probably a commercial music service?  
[5] A. Yes.  
[6] Q. I will represent to you that these numbers were of -- these  
[7] location counts on this chart are taken from the much larger  
[8] chart that is Joint Exhibit 1293 that has already been the  
[9] subject of discussion today. Am I correct that the way that  
[10] the license works, even though GrayV serves a much smaller  
[11] number of locations than Muzak, Muzak pays a considerably  
[12] higher rate?  
[13] A. Yes.  
[14] Q. And that's notwithstanding the fact that Muzak brings much  
[15] greater administrative efficiency to BMI by licensing 156,733  
[16] locations in 2008-2009 versus 671 locations serviced by GrayV?  
[17] A. Again, they had the benefit of the growth rate, they just  
[18] didn't grow where the small GrayV grew and they got the benefit  
[19] of the growth rate.  
[20] Q. There is no additional benefit to BMI that GrayV brings  
[21] relative to Muzak, correct?  
[22] A. No.  
[23] Q. They don't bring any administrative efficiencies to BMI?  
[24] A. No.  
[25] Q. They don't bring any lower costs to BMI than Muzak?

[1] A. No.  
[2] Q. The license fees paid by retail establishments to BMI do  
[3] not depend on the volume at which they play music, correct?  
[4] A. When you say volume.  
[5] Q. Quietly or loudly?  
[6] A. No. No.  
[7] Q. And the license fees paid by retail establishments to BMI  
[8] do not depend on the lighting in the store, do they?  
[9] A. No.  
[10] Q. Retail establishments do not have to report any of their  
[11] music use to BMI, do they?  
[12] A. Specific music use? No.  
[13] Q. Right. They don't report which songs they play and which  
[14] songs they don't play?  
[15] A. No.  
[16] Q. And BMI uses a proxy to make distributions to its members  
[17] on account of performances by retail establishments?  
[18] A. Yes, they do.  
[19] Q. Do you know what the proxy is?  
[20] A. It goes into the radio distribution.  
[21] Q. So whatever songs are made on the radio, that's how BMI  
[22] decides to distribute royalties paid by retail stores to its  
[23] publisher and writer affiliates?  
[24] A. Yes.  
[25] Q. If you could turn to tab 2 in your binder which is Joint

[1] Exhibit 781?  
[2] THE COURT: Mr. Marks, what conclusion do you want me  
[3] to draw from that last chart and your proposition that the  
[4] decrease in rate is a consequence only of growth?  
[5] MR. MARKS: That it is a completely arbitrary factor  
[6] that isn't reasonable to apply to other services. In other  
[7] words, that if a --  
[8] THE COURT: To other services?  
[9] MR. MARKS: To DMX in particular.  
[10] If Muzak believed it was growing or if a service  
[11] believes it's growing and thereby negotiates a favorable -- a  
[12] rate that favors its growth at the expense of competitors who  
[13] are losing locations, that's not something that a competitor  
[14] that's in a declining phase would negotiate in a competitive  
[15] market. And so, there is no reason to saddle those services  
[16] that don't believe it is reasonable to have their fees  
[17] determined by the fact that their competitor may have been  
[18] growing. It is not reasonable to saddle them with the adverse  
[19] consequences of that negotiation.  
[20] I will give an extreme example. If Muzak had  
[21] negotiated a license that said we'll agree that as long as our  
[22] name starts with the letter M through Z we will pay \$25 a  
[23] location, but if our name ever starts with A, with the first  
[24] half of the alphabet, we will pay \$36; well, that would be  
[25] unfair to DMX. And we are just pointing out that there is no

[1] logic, no economic rationale to applying the 8 percent growth  
[2] factor to DMX. It is not justified by any meaningful change in  
[3] the number of locations that are served because you have a  
[4] growth factor applied to a tiny service like GrayV that gets  
[5] paid a much lower rate than a very large service like DMX.  
[6] THE COURT: Well, couldn't one say that as long as  
[7] DMX' volume of locations remains the same the growth factor  
[8] doesn't apply to it?  
[9] MR. MARKS: But my point is only that the economic  
[10] consequence of the deal, if you look at what the actual  
[11] economic negotiation was at, let's say TruSonic for example,  
[12] which had already grown to the point where when they negotiated  
[13] their deal the effective rate was \$28. They agreed to a very  
[14] different deal than would have been -- than that form would  
[15] have applied to DMX which, even though it was much larger than  
[16] TruSonic, had lost a certain number of locations or even if  
[17] they had stayed the same or even if they had grown by less than  
[18] 8 percent.  
[19] The point of the examination and the point of the  
[20] chart is just to show that it is arbitrary. The difference in  
[21] rates isn't grounded in any economic principle of consequence  
[22] that either drives -- that alters BMI's costs of delivering the  
[23] license, that alters the value of the music or the value of the  
[24] performances. It is just an arbitrary factor.  
[25] THE COURT: Well, with the 8 percent clause in effect,

[1] every competitor who's market share is falling would prefer not  
[2] to have that clause in a standard lease because it benefits  
[3] those of its competitors whose rates are already increasing.  
[4] Is that correct?

[5] **MR. MARKS:** That's correct. And in fact as --

[6] **THE COURT:** And so, I would prefer to see what change  
[7] is made and how is this to be taken into effect in determining  
[8] a reasonable fee.

[9] **MR. MARKS:** Well, we -- we will get to the direct  
[10] license evidence as part of our affirmative case, but even  
[11] taking other commercial music service license agreements as a  
[12] benchmark, if your Honor were to take that as the benchmark  
[13] rather than the direct license evidence, the evidence at the  
[14] end of the case will show that the economic deal that TruSonic  
[15] for example agreed to is a much lower fee than the one that  
[16] Muzak agreed to or the one that some of the smaller services  
[17] that lost locations agreed to. And DMX shouldn't be taxed with  
[18] the rate that is paid at the high end of the scale or even the  
[19] middle of the scale.

[20] If BMI offered better deals to the TruSonics and the  
[21] Play Networks of the commercial music services industry, DMX is  
[22] likewise entitled to the economic benefit of those and not just  
[23] by rigorous, rigid application of the growth factor but by  
[24] looking at what the actual economics of the deal were.

[25] **THE COURT:** But this is a matter of argument which can

[1] to be based on locations, there are bound to be discrepancies  
[2] in the application.

[3] **MR. MARKS:** Your Honor, we don't --

[4] **THE COURT:** And if things bother you this much are we  
[5] going down the right path?

[6] **MR. MARKS:** Your Honor, I don't think we quibble with  
[7] the notion of setting a per location fee. I think where the  
[8] parties disagree is whether or not DMX should be saddled with a  
[9] fee with the high end or even the middle end of a deal that was  
[10] negotiated by a company in a different phase of growth, or at  
[11] least that thought it was in a different phase of growth than  
[12] DMX was in, or by other services that were in active growth  
[13] phases and then not giving the benefit of the true economic  
[14] bargain of those deals to a company like DMX that was not in an  
[15] active phase of growth.

[16] **THE COURT:** What is the true economic value of those  
[17] deals?

[18] **MR. MARKS:** Well, let's take TruSonic for example. At  
[19] the time they entered into the agreement they were not agreeing  
[20] to pay \$36.36 per location.

[21] **THE COURT:** But that point has been driven to death.  
[22] If you want to arrive at the true economic value of a deal  
[23] don't you have to do so over its life and how it applies in a  
[24] great variety of situations?

[25] **MR. MARKS:** Well, I would make two points. One is

[1] be based on facts which are essentially not contested. Isn't  
[2] that true?

[3] **MR. MARKS:** That's true. I was just asking -- the  
[4] point of the examination of the chart was to make sure that BMI  
[5] agreed that the difference in the rates between GrayV and Muzak  
[6] isn't justified by volume discount, any other benefit to BMI.

[7] **THE COURT:** Well, that would take one question.

[8] **MR. MARKS:** I apologize if I burdened the Court with  
[9] more questions, your Honor.

[10] **THE COURT:** You are making this point about no  
[11] economic value to the -- the distinction isn't based on  
[12] economic value and you are doing it because you want me to take  
[13] account of it in setting a fee and I'm still left a little bit  
[14] at a loss to understand mechanically how it bears on the  
[15] setting of the fee except for the obvious one that we discussed  
[16] yesterday.

[17] It seems to me in a sense that it is most useful as an  
[18] attack on the use of locations as a method for arriving at a  
[19] fee. Now, I thought that that was common ground between the  
[20] parties as being the best available way. It obviously has  
[21] defects with which you are spending some time.

[22] **MR. MARKS:** We don't --

[23] **THE COURT:** Is there a better way? Has your  
[24] fundamental position changed? Because if there is to be a  
[25] uniform form of lease and it is to be based -- and the fee is

[1] that if the economic consequences of the deal are different for  
[2] members of the commercial music service industry that have  
[3] signed the license with BMI DMX, we believe we are entitled to  
[4] the most favorable deal that's been offered to anybody else.  
[5] We can't be discriminated against if they've entered into deals  
[6] that end up with fees at 25. We shouldn't have to pay more  
[7] than 25 just simply because somebody grew and somebody didn't.  
[8] We are entitled to the most favorable deal they've offered to  
[9] anybody else.

[10] **THE COURT:** Well, they say the expression of the deal  
[11] it may have offered to everybody else is contained within the  
[12] license agreement that they tender to everybody else. You  
[13] don't like that.

[14] **MR. MARKS:** You're absolutely right we don't like  
[15] that.

[16] **THE COURT:** Because of a peculiarity in your economic  
[17] situation.

[18] **MR. MARKS:** Well, and because the factor that drives  
[19] our fees up and the fees for our primary competitors down is an  
[20] arbitrary one --

[21] **THE COURT:** Loss of business.

[22] **MR. MARKS:** -- loss of business. Even though we've  
[23] lost business and some other services have gained business, we  
[24] are still much larger, we still provide much greater  
[25] administrative efficiency to BMI, we are still in a much

[1] stronger negotiating position, we are still able to afford  
[2] experienced music licensing counsel capable of litigating the  
[3] rate court proceeding which the GrayVs of the world with 600  
[4] locations likely are not. And the purpose of the examination  
[5] is to show that this is an arbitrary factor that shouldn't  
[6] drive your Honor's determination of the fees applicable to us.

[7] **THE COURT:** I think I'm beginning to grasp the notion  
[8] that there are arbitrary effects of the lease the way it is  
[9] going.

[10] **MR. MARKS:** I have moved on from that portion of the  
[11] examination, your Honor, so I won't belabor the Court any more  
[12] on that point.

[13] **THE COURT:** Go ahead.

[14] **BY MR. MARKS:**

[15] **Q.** Mr. Annastas, I will continue to turn to some of the  
[16] industry license agreements that you talked about yesterday --

[17] **THE COURT:** While we are on this point let me ask  
[18] counsel, I think probably for BMI but subject to check by DMX,  
[19] I was thinking overnight, yes, I think it's expressed probably  
[20] most directly in JX 1293, the Play Network, Music Choice and  
[21] TruSonic per location fees paid across the five-year period and  
[22] I was trying to clarify for myself the significance of  
[23] evidence. It seems to me that the primary significance of the  
[24] terms which underlie these figures is the production of license  
[25] payments. The one thing which this chart does not make clear

[1] is how much money did BMI receive under the structures which  
[2] developed these per location figures each year. If these  
[3] figures do no more than to keep the million dollar figure  
[4] level, that's one thing. If it increased over the years  
[5] despite the drop in per location fees, that's perhaps of  
[6] interest. If it decreased, that's perhaps of interest. But in  
[7] any -- and the whole thing may, in the end, turn out to be  
[8] immaterial. I suspect from the fact that nobody made that  
[9] point clear that they think it is immaterial and may be, but in  
[10] the same tone a neophyte can't help being curious about it.

[11] **MR. MARKS:** Your Honor, the --

[12] **THE COURT:** And I can perform the arithmetic but I  
[13] have doubts in my ability and I would rather get it from the  
[14] people who know the facts. It is just arithmetic.

[15] **MR. FITZPATRICK:** If I could, your Honor, and I  
[16] attempted to do it, I apologize for not making it clear, the  
[17] sort of oversized chart that I went over with Mr. O'Neill that  
[18] had all those rows and columns on it --

[19] **THE COURT:** Oh.

[20] **MR. FITZPATRICK:** The far right-hand column would  
[21] yield the numbers that were on the demonstrative that your  
[22] Honor was looking at, the effective per location rate but also  
[23] each of the individual columns on that chart for every licensee  
[24] and for every year gives what they actually paid as well as  
[25] what their actual locations were so that you could do the math

[1] and get to the final column.

[2] **THE COURT:** Ah, yes. Your next to the last column is  
[3] total fees.

[4] **MR. FITZPATRICK:** Exactly, your Honor. And it  
[5] actually, it is actually broken out in more detail as well.  
[6] You can see what the base fee is on the left which is basically  
[7] the base fee is the amount the contract started at and then  
[8] each year, as your Honor knows, if the service grew within the  
[9] 8 percent there would be no adjustment. But, if the service  
[10] grew exceeding 8 percent there would be what is called an  
[11] organic surplus fee which is a column on that chart and that  
[12] reflects the dollars that get added for growth above 8 percent.  
[13] And I think the example that Mr. O'Neill -- that I used with  
[14] Mr. O'Neill was Play Network, which I believe is the very last  
[15] entry on page 15 of the chart and I think it is highlighted in  
[16] yellow.

[17] So, assuming my memory is correct about that --

[18] **THE COURT:** Yes. Play Network is there.

[19] **MR. FITZPATRICK:** Yes, and you will see in the far  
[20] right column it does get to the effective \$24.75 rate that  
[21] we've been talking about but there are also individual columns  
[22] that show Play Network grew, if I remember correctly, from at  
[23] the start of the deal it was about 11,000 locations and by the  
[24] end of the deal it had exceeded 30,000 locations. And so,  
[25] again, if memory serves we are talking about a license fee that

[1] started at around \$400,000 but by the end of the deal they were  
[2] paying a surplus fee of something on the order of \$800,000.  
[3] And so, that reflects --

[4] **THE COURT:** Well, the organic surplus fee was \$406,000  
[5] and the total fees are \$806,000. But, the word "total" might  
[6] mean the total number paid over the whole four-year period.

[7] If you could simply put on the what 1293 chart a  
[8] figure for each of the years of the total fees received in that  
[9] year in that year's regime, that would tell me all that I want  
[10] to know.

[11] **MR. FITZPATRICK:** Sure. We will be happy to add that.

[12] And just to clarify --

[13] **THE COURT:** Because it will show the play of the  
[14] actual money paid each year responsive to the application of  
[15] the 8 percent cushion and whatever increase over the cushion  
[16] there was.

[17] **MR. FITZPATRICK:** We will do so, your Honor. And to  
[18] give you a preview of what that will look like, for Play  
[19] Network --

[20] **THE COURT:** Yes.

[21] **MR. FITZPATRICK:** -- what this chart is meant to  
[22] reflect is that at the beginning of the deal there were 11,000  
[23] locations.

[24] **THE COURT:** Right.

[25] **MR. FITZPATRICK:** That meant there was a base fee of

[1] the 400,000.

[2] **THE COURT:** The 400,000, yes.

[3] **MR. FITZPATRICK:** The actual locations increased over  
[4] the term to 32,000 so there was an additional organic surplus  
[5] fee of the \$406,000. So, the \$806,000 would be the total fees  
[6] that Play Network paid in the year 2009.

[7] **THE COURT:** Yes.

[8] **MR. FITZPATRICK:** And you would divide that by the  
[9] actual locations and that gets to the \$24.75. So, we will add  
[10] that data to the demonstrative for your Honor.

[11] **THE COURT:** Yes; and year by year as you have done on  
[12] Exhibit 1293?

[13] **MR. FITZPATRICK:** Certainly, your Honor. Yes.

[14] **THE COURT:** It is just arithmetic, I recognize that,  
[15] but I feel uncertain with arithmetic.

[16] **MR. FITZPATRICK:** We will do that, your Honor.

[17] **THE COURT:** Okay. Thank you.

[18] All right, Mr. Marks. I apologize for the  
[19] interruption.

[20] **MR. MARKS:** Not at all, your Honor. And I have a few  
[21] clean up questions on some of the industry form agreements that  
[22] Mr. Annastas discussed yesterday.

[23] **BY MR. MARKS:**

[24] **Q.** Are you at tab 2 in your binder of Joint Exhibit 781?

[25] **A.** Yes.

[1] fee criteria.

[2] **Q.** And the fee levels were determined by BMI itself, correct?

[3] **A.** Yes.

[4] **Q.** As with retail stores, the license fees that restaurants  
[5] and bars paid don't depend on how loud the music -- how loudly  
[6] they're playing the music, correct?

[7] **A.** No.

[8] **Q.** And the fees that restaurants and night clubs and bars pay  
[9] don't depend on the lighting in the venue, do they?

[10] **A.** No.

[11] **THE COURT:** No, they don't any more than they did the  
[12] first time you asked the question.

[13] **MR. MARKS:** Well, this is for a different category of  
[14] licensee, your Honor.

[15] **THE COURT:** Oh, I see.

[16] **MR. MARKS:** I'm just establishing that for various  
[17] industries these aren't factors that determine fees.

[18] **THE COURT:** Can we take it as a general proposition  
[19] that they don't, in any event, depend on the degree of  
[20] lighting?

[21] **MR. MARKS:** With one exception, your Honor, and I  
[22] believe that's the bowling industry.

[23] **THE COURT:** Okay.

[24] **BY MR. MARKS:**

[25] **Q.** I will ask the question.

[1] **Q.** And that's the -- that's the current form license for  
[2] eating and drinking establishments?

[3] **A.** Yes, it is.

[4] **Q.** And the majority of BMI licensees that fall within general  
[5] licensing are actually fall within this category of  
[6] restaurants, night clubs and bars, correct?

[7] **A.** There is approximately half of -- yeah, little more than  
[8] half.

[9] **Q.** And there are many eating and drinking establishments that  
[10] do not take a BMI license, correct?

[11] **A.** Correct.

[12] **Q.** At last count BMI's internal estimate of its coverage of  
[13] the restaurant and bar industry was about 60 percent?

[14] **A.** Yes.

[15] **Q.** And there was -- you explained yesterday this was the form  
[16] license that was developed with some input from state  
[17] restaurant associations?

[18] **A.** From state restaurant association executives, yes.

[19] **Q.** Their input was limited to the criteria that you were using  
[20] for fees as opposed to negotiating the actual fees themselves,  
[21] correct?

[22] **A.** As I explained, we went to the national restaurant  
[23] association and the state restaurant association to negotiate  
[24] an agreement and they weren't ready to negotiate the actual  
[25] fees. So, they did give us the input that we needed for the

[1] Is there any industry other than -- putting bowling to  
[2] one side for a minute -- are any industries licensed by BMI  
[3] where the fees are affected by whether -- by the volume of the  
[4] music, the volume at which the music is played or the lighting  
[5] in the venue?

[6] **A.** No.

[7] **Q.** And restaurants and bars don't report their music use to  
[8] BMI, correct?

[9] **A.** Not currently.

[10] **Q.** Is that also the same distribution you used, the radio  
[11] distribution to pay royalties?

[12] **A.** Currently, yes.

[13] **Q.** And yesterday Mr. Fitzpatrick asked you some questions  
[14] about the form license that BMI offers to hotels, correct?

[15] **A.** Yes.

[16] **Q.** And that's -- you want to see it, I believe it is tab 1 in  
[17] your binder.

[18] **A.** Yes.

[19] **Q.** And you mentioned that this license is a product of  
[20] negotiations with the hotel association, correct?

[21] **A.** Yes, it is.

[22] **Q.** The hotel association is not represented by outside counsel  
[23] with experience in music licensing matters in those  
[24] negotiations, is it?

[25] **A.** I don't -- Weil Gotshal, not that I'm aware of, but they

[1] have had attorneys present.  
[2] **Q.** They haven't had outside counsel present in those  
[3] negotiations, have they?  
[4] **THE WITNESS:** I don't know.  
[5] **THE COURT:** Mr. Marks, this isn't going to help me  
[6] much.  
[7] **BY MR. MARKS:**  
[8] **Q.** BMI refers to bowling alleys as bowling centers, correct?  
[9] **A.** Yes.  
[10] **THE COURT:** Unless you can tie it to a particular  
[11] result in the terms of the fee arrangement.  
[12] **MR. MARKS:** The purpose of this line of examination,  
[13] your Honor, is again to show the arbitrary distinction of  
[14] singling out bowling from any of these other industries. I  
[15] will move directly to the bowling agreement.  
[16] **THE COURT:** Do whatever you please.  
[17] **MR. MARKS:** Excuse me?  
[18] **THE COURT:** Do whatever you please.  
[19] **MR. MARKS:** Thank you, your Honor. I will try to be  
[20] brief.  
[21] **BY MR. MARKS:**  
[22] **Q.** Was the -- you discussed yesterday the agreement that's  
[23] been negotiated with the bowling proprietors association?  
[24] **A.** Yes.  
[25] **Q.** And they were not represented by outside counsel in those

[1] negotiations, were they?  
[2] **A.** No, but I think the -- they have an attorney that was on  
[3] board that we negotiated with.  
[4] **Q.** And at the time that BMI developed its form license for  
[5] BPAA members, a lot of bowling alleys were licensed either  
[6] under a commercial music service license or the form license  
[7] for restaurants, correct?  
[8] **A.** I couldn't tell you the number because we don't get the  
[9] numbers from bowling centers for their services.  
[10] **Q.** But your general understanding was that before you had the  
[11] separate form license for bowling centers, bowling alleys were  
[12] licensed either through a CMS or through the restaurant  
[13] license, correct?  
[14] **A.** Yes.  
[15] **Q.** And the form license for -- there is a separate form  
[16] license for individual bowling centers you mentioned yesterday?  
[17] **A.** Yes, there is.  
[18] **Q.** And that form license was negotiated without input from  
[19] representatives of individual bowling centers, correct?  
[20] **A.** It was outside of the bowling proprietors' agreement.  
[21] **Q.** And there was no other input, correct?  
[22] **A.** No.  
[23] **THE COURT:** Mr. Marks, what distinction are you  
[24] drawing? The individual bowling -- a separate license for  
[25] individual bowling centers as distinct from what?

[1] **MR. MARKS:** From a bowling alley that is a member of a  
[2] bowling trade association. So, if you are a bowling alley --  
[3] **THE COURT:** I see.  
[4] **MR. MARKS:** -- and you join the trade association, you  
[5] get a lower rate. If you are outside the trade association,  
[6] you pay a higher rate.  
[7] **Q.** Is that correct, Mr. Annastas?  
[8] **A.** Yes.  
[9] **Q.** And, the fees offered under the bowling center license --  
[10] **THE COURT:** Why is that so?  
[11] **THE WITNESS:** The Bowling Proprietors' Association  
[12] actually collects the money for us. It is savings in the  
[13] administration costs. And there are a lot of bowling centers  
[14] that don't want to belong to an association so we had to  
[15] develop a license for those that didn't want to belong to the  
[16] association.  
[17] That's the basic reason.  
[18] **BY MR. MARKS:**  
[19] **Q.** And the fees offered under the bowling center licenses don't  
[20] depend on whether or not the bowling center offers rock & bowl,  
[21] do they?  
[22] **A.** Say that again.  
[23] **Q.** I'm saying that the fees that the bowling center pays --  
[24] **A.** Right.  
[25] **Q.** -- don't depend on whether or not it offers a service

[1] called rock & bowl?  
[2] **A.** No.  
[3] **Q.** And it doesn't depend on whether or not the bowling center  
[4] actually offers a service called cosmic bowling?  
[5] **A.** No, but I know there are definitions within the license as  
[6] to what cosmic bowling is and so forth. There is a definition  
[7] on how the music is used.  
[8] **Q.** The bowling centers are permitted to offer those services  
[9] under the license but the fees don't depend on whether or not  
[10] they do offer that service, correct?  
[11] **A.** Right.  
[12] **Q.** And it doesn't matter how much, you know, how much rock and  
[13] bowl or how much cosmic bowling they offer, correct?  
[14] **A.** Not that I'm aware of.  
[15] **MR. MARKS:** No further questions, your Honor.  
[16] **THE COURT:** Thank you, Mr. Marks.  
[17] Anything further for Mr. Annastas?  
[18] **MR. FITZPATRICK:** Yes, your Honor.  
[19] REDIRECT EXAMINATION  
[20] **BY MR. FITZPATRICK:**  
[21] **Q.** Hello, Mr. Annastas.  
[22] Just to follow up on one question you were asked  
[23] before. You were asked about administrative efficiencies  
[24] provided to BMI by the commercial music services industry and I  
[25] think that you answered to a degree they do that. I just

[1] wanted to ask you to expand on that, why the answer wasn't just  
[2] yes, that it was to a degree?  
[3] **A.** As much as we offer the volume discount we have no idea of  
[4] what locations they're servicing. They don't give us a list of  
[5] anyone they're servicing. So, from the 165,000 Muzak is  
[6] servicing we still have to find out when we make contact with  
[7] all these establishments that they're with Muzak or with DMX  
[8] because they've refused to give us a list over the years. So,  
[9] we've actually only gotten the number of locations.

[10] **Q.** And how does that affect BMI's administrative costs or the  
[11] administrative efficiencies that they offer to BMI?

[12] **A.** As we are talking about costs and sales reps and the BDS,  
[13] the business development group most of what they do, if the  
[14] total industry has 400,000 locations that they're servicing, we  
[15] are still calling them to find out, whoops, they've got Muzak.  
[16] So, the cost of doing that is burdensome on BMI.

[17] **Q.** If I could please show the witness, it was the document we  
[18] were looking for the other day, it is Joint Exhibit 0743.

[19] **Mr. Annastas,** could you take a look at this and  
[20] identify it, please?

[21] **A.** It is a chart that was prepared of all the various Muzak  
[22] proposals.

[23] **Q.** And just focusing on the handwriting portion of the  
[24] document, whose handwriting is that?

[25] **A.** That's mine.

[1] **Q.** And why were you writing this?

[2] **A.** I think we had it in a meeting with Muzak and I was getting  
[3] this information from Muzak.

[4] **Q.** And if you could look over on the far left there is a note  
[5] that starts with 2 to 3 percent. Do you see that?

[6] **A.** Yes.

[7] **Q.** Could you read that?

[8] **A.** It says 2 to 3 percent growth factor.

[9] **Q.** And what does that note mean?

[10] **A.** At the time that was when they introduced the -- Muzak  
[11] introduced the idea that they would be growing approximately 2  
[12] to 3 percent per year.

[13] **Q.** Mr. Annastas, if you could take a look --

[14] **MR. MARKS:** Your Honor, I would just object. It is  
[15] hearsay of any indication of what Muzak said.

[16] **THE COURT:** Overruled.

[17] **MR. MARKS:** To the extent it is being offered for the  
[18] truth of what Muzak said I believe it would be hearsay for  
[19] Mr. Annastas to testify about what they said.

[20] **THE COURT:** Thank you. I will receive it.

[21] **BY MR. FITZPATRICK:**

[22] **Q.** Can you take a look at -- sorry -- at Respondent's 157 if  
[23] you still have that? It was a document you were shown  
[24] yesterday and we have another copy if you don't have it.

[25] **A.** Is it in the book or --

[1] **Q.** No, one of the documents that Mr. Marks reviewed with you.

[2] **A.** Okay. It is a letter that went out?

[3] **Q.** Yes.

[4] **A.** Okay.

[5] **Q.** And you testified about this yesterday and I just wanted to  
[6] ask you about the last paragraph. The last paragraph actually  
[7] says if you choose to continue as a litigant in the rate  
[8] court -- let me just start.

[9] This is a letter that Teresa Stafford-Scherer sent to  
[10] a company called Sound Solutions, correct?

[11] **A.** Yes.

[12] **Q.** And that was a member of the commercial music services  
[13] industry?

[14] **A.** Yes.

[15] **Q.** And they had not, as of yet, accepted the industry-wide  
[16] license that BMI was offering after it concluded its  
[17] negotiations with Muzak, correct?

[18] **A.** Yes.

[19] **Q.** And so one of the things that Ms. Stafford-Scherer is  
[20] telling Sound Solutions is that if you choose to continue as a  
[21] litigant in the rate court proceeding, please so indicate below  
[22] by the signature of an authorized individual in your company.

[23] Correct?

[24] **A.** Yes.

[25] **Q.** And she's informing them if you continue as a litigant, BMI

[1] reserves the right to take all appropriate steps to protect the  
[2] interests of its affiliated songwriters, composers and  
[3] publishers including seeking additional retroactive final fees  
[4] for the entire open period back to 1994. Correct?

[5] **A.** Yes.

[6] **MR. MARKS:** Your Honor, I would object to this line of  
[7] question as leading.

[8] **THE COURT:** What is the objection?

[9] **MR. MARKS:** I believe he is leading the witness, your  
[10] Honor.

[11] **THE COURT:** The form of the question?

[12] **MR. MARKS:** Correct.

[13] **THE COURT:** You believe it is leading.

[14] **MR. MARKS:** I believe he is leading the witness, yes.

[15] **THE COURT:** Overruled.

[16] **BY MR. FITZPATRICK:**

[17] **Q.** Mr. Annastas, this was an -- the position that is described  
[18] here, is that the position that BMI was taking with Muzak  
[19] whether it was in the rate court that it was seeking  
[20] retroactive fees back to 1994?

[21] **A.** The original rate court? Yes.

[22] **Q.** And, if the -- if Sound Solutions had elected to -- was  
[23] Muzak taking the position that they wanted a retroactive  
[24] decrease in the fees in rate court?

[25] **A.** Yes.

[1] Q. And if Sound Solutions had elected to remain in the rate  
[2] court, could they have taken the position that they wanted a  
[3] retroactive decrease in fees so that BMI would actually have to  
[4] pay them money for the decade starting in 1994?

[5] A. Yes.

[6] Q. Now, if BMI had proceeded in rate court with Sound  
[7] Solutions -- first of all, as it says here they would have  
[8] sought retroactive fees for the period beginning in 1994,  
[9] correct?

[10] A. Correct.

[11] Q. And would BMI have also sought the \$36.36 blanket license  
[12] fee rate?

[13] A. Yes.

[14] Q. I just want to look at some of the --

[15] THE COURT: Mr. Fitzpatrick, I take it that the  
[16] respondent's inquiry directed to that sentence that you just  
[17] read into the record is if BMI was content to write off all of  
[18] any increase based on the interim payments and live entirely  
[19] with the fee with the new fee agreement, why was it putting  
[20] this sentence into the letter directed simply to the choice not  
[21] to accept the new fee agreement?

[22] (Continued on next page)

[23]  
[24]  
[25]

[11] the purpose of my last question, which is if BMI had gone to  
[12] rate court, its position would have been that it wanted the  
[13] past and it wanted 36.36, not oh, we're going to ask for  
[14] something from the past so that means our rate going forward is  
[15] \$32 or \$33. Its position would remain consistent, which is for  
[16] '04 to '09 it's \$36.36. For the past, if we can do this with  
[17] an agreement, we'll finalize. If we have to go to rate court  
[18] even to get the 36.36, then part of the cost of that is we are  
[19] going to litigate our belief that we were entitled to money for  
[20] the past as well.

[21] BY MR. FITZPATRICK:

[12] Q. If we could take a look at Petitioner's Exhibit 11, which  
[13] is a document, it's in evidence and it was used with you  
[14] yesterday, Mr. Annastas.

[15] A. Could you tell me what it looks like?

[16] Q. It's the notes from the negotiation, the July 9, '02  
[17] negotiation.

[18] A. Okay, I've got it.

[19] Q. Do you have that, Mr. Annastas?

[20] A. Yes, I do.

[21] Q. And I just want to make sure we have the terms of all of  
[22] these offers clear. So if we turn to the second page of this  
[23] document, second full paragraph, am I correct that it's  
[24] describing a BMI offer, correct?

[25] A. Where it says BMI indicated?

[1] MR. FITZPATRICK: As part of the agreement with Muzak,  
[2] BMI was -- if the parties were willing to reach an agreement,  
[3] that was the agreement BMI was willing to reach. In part, I  
[4] think as Mr. Annastas testified yesterday because the benefit  
[5] you get from getting the retroactive fees would be eaten up by  
[6] the expenses in rate court to actually go back and get it. But  
[7] if a party was not, if the agreement was not acceptable to a  
[8] party and they wanted to exercise their right to go to rate  
[9] court, which they still had, there was in fact a rate court  
[10] case pending, then BMI is being clear its position in rate  
[11] court is and always would have been with Muzak or anyone else  
[12] that it was entitled to both retroactive fees and a \$36.36 rate  
[13] going forward.

[14] THE COURT: Yes, I see. This sentence would still be  
[15] not inconsistent with a calculation which carried forward some  
[16] of the money owed, as viewed by BMI for the interim period into  
[17] the new rate.

[18] MR. FITZPATRICK: I think it would, your Honor. It  
[19] certainly is not inconsistent with the idea that BMI believed  
[20] it should get some money for the past. I think that's  
[21] consistent. BMI has always believed --

[22] THE COURT: But that isn't the issue. The issue is  
[23] whether, whether some of the money it wanted for the past was  
[24] carried over into and satisfied by to some extent the new fee.

[25] MR. FITZPATRICK: Exactly, your Honor. And that was

[1] Q. Yes.

[2] A. Yes.

[3] Q. And the proposal as you discussed yesterday was that there  
[4] was a \$32.50 per location rate.

[5] A. Yes.

[6] Q. Now, I want to talk about the differences between this  
[7] offer and the final agreement that BMI reached with Muzak.  
[8] First of all, as I think was discussed yesterday, this per  
[9] location rate is \$32.50. The rate, the per location rate in  
[10] the Muzak deal started at \$36.36, correct?

[11] A. Yes.

[12] Q. Now, the term of the Muzak agreement was July 2004 to  
[13] June 2009, correct?

[14] A. Yes.

[15] Q. Does it say in this document what the term of BMI's \$32.50  
[16] per location offer was?

[17] A. Not that I see.

[18] Q. And given that this was occurring in July 2002, it's  
[19] unlikely that it would have been an '04 to '09 offer, correct?

[20] A. Yes.

[21] MR. MARKS: Objection, your Honor. Leading the  
[22] witness.

[23] THE COURT: Overruled.

[24] Q. And this paragraph says \$32.50 per location, so am I  
[25] correct that this was a straight per location offer from BMI?

[1] A. Yes.  
[2] Q. And was the ultimate agreement with Muzak a per location  
[3] deal?  
[4] A. Yes.  
[5] Q. Could you explain how that worked, the Muzak deal?  
[6] A. Well, again, the Muzak, when Muzak reported to us and we  
[7] finally came to a deal, they had 165,000 locations. They were  
[8] going to pay us \$6 million per year, 165,000 into the 6 million  
[9] came out to be \$36.36.  
[10] Q. But would -- changes in the number of Muzak locations would  
[11] not result in corresponding changes in the Muzak fees, correct?  
[12] A. Only if they got past the growth factor rate.  
[13] Q. And this \$32.50 per location rate doesn't have any growth  
[14] provision in it, correct?  
[15] A. No.  
[16] Q. Now, if we drop down two paragraphs. It says BMI brought  
[17] up the issue of retroactivity back to 1994, correct?  
[18] A. Yes.  
[19] Q. Does it say anything in here about how much money BMI was  
[20] seeking for retroactivity at this point?  
[21] A. No, there's no money mentioned.  
[22] Q. If I could just go on to the next BMI offer that we looked  
[23] at yesterday, which was used with you. It's Joint Exhibit 73.  
[24] It's an August 20, 2003 letter from you to Mr. Zendan?  
[25] A. It's in the book?

[1] work in this deal?  
[2] A. In this deal, there's an annual license fee specified on  
[3] each year, and then any new locations had a per location rate.  
[4] Q. In this particular offer the annual license fees increase  
[5] each year going from 4.4 million to 6.4 million, correct?  
[6] A. Yes, they do.  
[7] Q. I believe, as Mr. Marks pointed out yesterday, there was a  
[8] \$6 million retroactive component in this offer as well,  
[9] correct?  
[10] A. Yes.  
[11] Q. I just want to talk briefly about number of locations. If  
[12] you could turn the page, how many locations was this offer  
[13] premised on?  
[14] A. 157,000.  
[15] Q. And how many locations was the final agreement with Muzak  
[16] premised on?  
[17] A. 165,000.  
[18] Q. And if you look back to page 1, the column on the far right  
[19] has a heading called dollars per new location. Can you explain  
[20] what that is?  
[21] A. That's what we would be charging them for any new locations  
[22] above and beyond the 4 point million and 157,000 locations.  
[23] Q. If you wanted to calculate how this would work out with  
[24] 165,000 locations, you would have to, am I correct, for each  
[25] year take the difference between 157 and 165, which is 8,000,

[1] Q. I'm sorry?  
[2] A. In the book or --  
[3] Q. It was a document Mr. Marks used with you, so it should be  
[4] a loose document.  
[5] A. The August 20, 2003?  
[6] Q. Yes.  
[7] A. Yes.  
[8] Q. Again, I just want to look at the offer that's here and  
[9] compare it to the final agreement reached with Muzak. First of  
[10] all, in the annual license fee column, I believe Mr. Marks  
[11] added those numbers up with you yesterday and reached  
[12] \$27 million, correct?  
[13] A. Yes.  
[14] Q. And the final deal with Muzak as we know was \$30 million?  
[15] A. Yes.  
[16] Q. And again, we mentioned before the deal with Muzak was from  
[17] mid-'04 to mid-'09, correct?  
[18] A. Correct.  
[19] Q. The years of this deal are 2003 to 2007, is that correct?  
[20] A. Correct.  
[21] Q. Now, the terms of the Muzak deal are \$6 million a year,  
[22] correct? The total dollar amount doesn't change from year to  
[23] year?  
[24] A. Correct.  
[25] Q. And this is -- how does that compare to the way the dollars

[1] and then for each year multiply it by the dollars per new  
[2] location rate on the far right?  
[3] A. Yes.  
[4] Q. And the way the dollars per new location works is that for  
[5] in 2003 dollars per new location was \$27.85, correct?  
[6] A. Correct.  
[7] Q. But over the course of the deal, by 2007, dollars per new  
[8] location would be \$40.50?  
[9] A. Yes.  
[10] Q. And 2007 was the end of this deal, but was only in the  
[11] middle of the term of the final agreement reached with Muzak,  
[12] correct?  
[13] A. Correct.  
[14] Q. Okay. Last one. If we could look at Joint Exhibit 1164,  
[15] which was also used with you yesterday. This is the one with  
[16] BMI proposals A1, A, B and C. Mr. Marks used it with you.  
[17] A. Okay.  
[18] Q. And again, just want to make sure I have the comparison.  
[19] We'll use BMI proposal A1. I want to make sure we have the  
[20] comparison of this with the final agreement reached with Muzak.  
[21] A. Okay.  
[22] Q. First, I believe you did this yesterday, total annual fee,  
[23] if you add the five years up, is \$27.5 million, correct?  
[24] A. Correct.  
[25] Q. And the agreement you reached with Muzak was \$30 million,

[1] correct?  
[2] **A.** Correct.  
[3] **Q.** This also had a \$5.5 million in the retro column?  
[4] **A.** Correct.  
[5] **Q.** And there was no retro component in the final deal with  
[6] Muzak, correct?  
[7] **A.** Correct.  
[8] **Q.** Now, the term of this agreement, is, am I correct that it's  
[9] full year 2004 to full year 2008?  
[10] **A.** Yes.  
[11] **Q.** And the, again, the time term with Muzak was mid-year '04  
[12] to mid-year '09, correct?  
[13] **A.** Correct.  
[14] **Q.** In the location column, what was the estimated number of  
[15] locations at this point for Muzak?  
[16] **A.** 164,000.  
[17] **Q.** And you mentioned before it was 165,000 at the final deal,  
[18] correct?  
[19] **A.** Yes.  
[20] **Q.** Now, if you could, the organic, well, actually it's not  
[21] organic, the growth provision, I'm sorry, in this offer, I  
[22] think you testified yesterday was 2.5 percent, correct?  
[23] **A.** Correct.  
[24] **Q.** And it says in the parenthesis organic or existing  
[25] affiliate, correct?

[1] **A.** Correct.  
[2] **Q.** And could you explain what that means?  
[3] **A.** This was going to include whether or not they acquired  
[4] another service. So if they acquired the service, it would be  
[5] part of the growth factor of 2.5 percent.  
[6] **Q.** Now, final deal with Muzak, as we've said many times, the  
[7] growth provision was 8 percent, correct?  
[8] **A.** Yes.  
[9] **Q.** And we've been calling it an organic growth provision. Is  
[10] that different than the growth provision that was here?  
[11] **A.** Yes.  
[12] **Q.** Could you explain that?  
[13] **A.** The organic was total new accounts that they would be  
[14] servicing that they never had before. Again going back to the  
[15] existing affiliate or existing service, if they bought another  
[16] service they would be paying us for those additional locations  
[17] without the growth factor.  
[18] **Q.** And then just so we understand the final column, the per  
[19] 100 location adjustment, are those additional amounts that  
[20] Muzak would be paying if they exceeded this growth factor we've  
[21] been talking about?  
[22] **A.** Yes.  
[23] **Q.** And they go, if I have the math right, it's actually done  
[24] as a per hundred location adjustment and then it's in thousands  
[25] of dollars, but the way it works out is it would be \$27 a

[1] location in '04 going up to \$42 a location in 2008, is that  
[2] correct?  
[3] **A.** Yes, that's correct.  
[4] **Q.** I think you mentioned during your direct testimony that you  
[5] described the Muzak affiliates, correct?  
[6] **A.** Yes.  
[7] **Q.** And we talked about the fact that their agreement was  
[8] included in the negotiation that BMI had with Muzak?  
[9] **A.** Yes.  
[10] **Q.** Were the Muzak affiliates represented by counsel?  
[11] **A.** Yes.  
[12] **Q.** And who is that?  
[13] **A.** Jack Carroll.  
[14] **MR. FITZPATRICK:** Thank you. I have no further  
[15] questions.  
[16] **MR. MARKS:** No recross, your Honor.  
[17] **THE COURT:** Thank you, Mr. Annastas. You're excused.  
[18] **THE WITNESS:** Appreciate it.  
[19] (Witness excused)  
[20] **MR. FITZPATRICK:** Your Honor, could I do a quick  
[21] housekeeping issue before you call the next witness?  
[22] **THE COURT:** Yes.  
[23] **MR. FITZPATRICK:** On, and the court reporter has  
[24] notified me that I've again failed to identify two exhibits.  
[25] On January 19, page 83 of the transcript, there was a reference

[1] to an exhibit that I didn't identify. It was Joint Exhibit  
[2] 1110.  
[3] **THE COURT:** Is there a transcript?  
[4] **MR. FITZPATRICK:** Yes, your Honor.  
[5] **THE COURT:** I don't seem to have it.  
[6] (Pause)  
[7] **THE COURT:** Forgive me. Go ahead.  
[8] **Q.** And on the same day, at page 103 of the transcript there  
[9] was a reference to an exhibit which I should have called Joint  
[10] Exhibit 1312.  
[11] One other matter, your Honor. I made an error  
[12] yesterday in a question that I asked to Mr. O'Neill. I had  
[13] asked Mr. O'Neill when we were talking about the domestic  
[14] overhead rate that BMI applies, I had asked him whether that  
[15] domestic overhead rate was applied to every dollar in the  
[16] United States that BMI brings in, and I had forgotten an  
[17] exception. There is an exception which I completely forgot.  
[18] **THE COURT:** I think his answer was yes.  
[19] **MR. FITZPATRICK:** It was, your Honor, but I had made a  
[20] mistake in asking the question, because there is an exception  
[21] for public broadcasting educational television like Channel 13  
[22] in New York. Those are domestic dollars and BMI historically  
[23] has taken a zero percent overhead rate on that. I don't think  
[24] it affects our position, but I didn't want there to be an  
[25] inaccuracy in the record, your Honor.

[11] **THE COURT:** Is there --  
[12] **MR. MARKS:** No objection to that clarification.  
[13] **THE COURT:** Thank you. So accepted. Mr. O'Neill's  
[14] testimony has been modified accordingly.  
[15] **MR. FITZPATRICK:** Should we call our next witness or  
[16] is it time for a break, your Honor?  
[17] **THE COURT:** We're about the time for a mid-morning  
[18] break, so do it now. Come back at 11:25.  
[19] **MR. FITZPATRICK:** Thank you, your Honor.  
[10] (Recess)  
[11] **MR. FITZPATRICK:** May we call our next witness, your  
[12] Honor?  
[13] **THE COURT:** Yes.  
[14] **MR. FITZPATRICK:** Your Honor, BMI calls Ms. Sindee  
[15] Levin.  
[16] SINDEE LEVIN,  
[17] called as a witness by the Petitioner,  
[18] having been duly sworn, testified as follows:  
[19] **THE DEPUTY CLERK:** Please state your name and spell  
[20] your last name slowly for the record.  
[21] **THE WITNESS:** My name is Sindee, and it's S as in Sam,  
[22] i-n-d-e-e. My last name is Levin, L-e-v as in Victor, i-n.  
[23] **MR. FITZPATRICK:** Your Honor, may I approach with a  
[24] binder of exhibits?  
[25] **THE COURT:** Yes.

[1] streaming or sort of euphemistically called the internet, which  
[2] encompasses increasing technologies.  
[3] **Q.** Are they different than the performing rights that BMI  
[4] licenses?  
[5] **A.** Yes.  
[6] **Q.** Does AMRA license any other kind of rights besides the  
[7] mechanical rights that you've just described?  
[8] **A.** In certain situations AMRA does do what's called  
[9] synchronization licensing, which is music and film or  
[10] television, commercials, possibly.  
[11] **Q.** And what is the synch right actually for music and film and  
[12] television?  
[13] **A.** It's the synchronization of music to a picture and it can  
[14] be in any medium.  
[15] **Q.** And again, is that different from the performing right that  
[16] BMI licenses?  
[17] **A.** Yes, it is.  
[18] **Q.** Does AMRA ever license performing rights?  
[19] **A.** No. It's not authorized under our mandate.  
[20] **Q.** Could you estimate roughly how many mechanical and  
[21] synchronization licenses AMRA will do in a given year?  
[22] **A.** For the United States and Canada, which is the only parts  
[23] of the world that issue a mechanical license, I would say  
[24] approximately 250 to maybe 300 a year.  
[25] **Q.** Ms. Levin, if I could ask you to take the binder in front

[1] **DIRECT EXAMINATION**  
[2] **BY MR. FITZPATRICK:**  
[3] **Q.** Good morning, Ms. Levin.  
[4] **A.** Good morning, sir.  
[5] **Q.** Could you please tell the Court what it is you do for a  
[6] living?  
[7] **A.** I am a lawyer in the State of California by profession. I  
[8] run a music publishing company and in addition I run a society  
[9] called AMRA, which is an acronym for American Mechanical Rights  
[10] Agency, Inc., which is a mechanical rights society in the  
[11] United States.  
[12] **Q.** And how many people work for AMRA?  
[13] **A.** There's approximately eight people. Some in my office in  
[14] Los Angeles. One in, actually in Israel right now or  
[15] continental Europe, and a couple off site who do data  
[16] processing.  
[17] **Q.** And you mentioned that it's, I believe you said the acronym  
[18] was the American Mechanical Rights Agency. What is a  
[19] mechanical rights agency?  
[20] **A.** AMRA is, what the acronym for that, it's a society that  
[21] collects mechanical royalties.  
[22] **Q.** And could you explain what mechanical royalties are?  
[23] **A.** Traditionally, mechanical royalties would have been for  
[24] albums, CD's, mechanical reproduction of music. It has grown  
[25] into the new technologies, which may be digital downloading or

[1] of you and turn to tab 1 of the binder.  
[2] **A.** Sure.  
[3] **Q.** There is an exhibit at tab one which was been marked  
[4] Respondent's Exhibit 0086.  
[5] **A.** I have it, sir.  
[6] **Q.** If you could take a look at that and identify it, please.  
[7] **A.** Looks like e-mail correspondence between me and Barry  
[8] Knittel.  
[9] **MR. FITZPATRICK:** I would move this document's  
[10] admission, your Honor?  
[11] **MR. MARKS:** No objection.  
[12] **THE COURT:** Proceed.  
[13] (Respondent's Exhibit RX 0086 received in evidence)  
[14] **Q.** Ms. Levin, who is Mr. Knittel?  
[15] **A.** To my understanding, he runs DMX.  
[16] **Q.** And is bottom half of this, is the LALaw9049, is that one  
[17] of your e-mail addresses?  
[18] **A.** Yes, it is.  
[19] **Q.** So in your e-mail to Mr. Knittel, you say: "Hi, Barry. I  
[20] really appreciate you taking the time to meet with me the other  
[21] day." Do you see that?  
[22] **A.** Yes.  
[23] **Q.** Do you recall what was discussed at the meeting between  
[24] yourself and Mr. Knittel?  
[25] **A.** I think we discussed our respective backgrounds, I'm sure

[1] some industry gossip. Other than that, what DMX was and we  
[2] also had a discussion about certain clients that I had that had  
[3] their music used at airlines, on the flights, and he told me he  
[4] could assist me with getting collection for that.  
[5] **Q.** With respect to DMX, had you known what DMX was prior to  
[6] your meeting with Mr. Knittel?  
[7] **A.** No.  
[8] **Q.** Now, is the top half of this document, is that Mr. Knittel  
[9] responding to you?  
[10] **A.** It appears so.  
[11] **Q.** And the last sentence of Mr. Knittel's e-mail to you is a  
[12] question that says -- sorry, the whole last paragraph says:  
[13] "After review of the attached catalog, DMX would be interested  
[14] in entering into a direct license agreement for AMRA publishing  
[15] rights." Do you see that?  
[16] **A.** Yes.  
[17] **Q.** And what did you understand Mr. Knittel to mean by  
[18] publishing rights in that context?  
[19] **A.** Publishing rights is used sort of in a casual way. I took  
[20] it as mechanicals, because all AMRA collects are mechanical  
[21] rights.  
[22] **Q.** And did you believe Mr. Knittel was referring to  
[23] performing -- to publishing rights to be including performing  
[24] rights on the e-mail?  
[25] **A.** No, I did not.

[1] **Q.** It concludes, "With would you like me to have MRI forward  
[2] to you the appropriate DMX publishing license agreement." Do  
[3] you see that?  
[4] **A.** Yes.  
[5] **Q.** Did MRI in fact forward you an agreement?  
[6] **A.** Yes, it did.  
[7] **Q.** If you could take a look at tab 2 of your binder, which is  
[8] Joint Exhibit 0947, and if you could identify that for me,  
[9] please?  
[10] **A.** Looks like e-mail correspondence between Trent Smith and  
[11] myself, and to my understanding, this Trent is a licensing  
[12] manager for Music Reports Inc. or MRI.  
[13] **Q.** And what's MRI?  
[14] **A.** MRI historically, I think they're music clearance and now  
[15] works with many of the digital providers and assists with  
[16] clearances, with getting licenses and with royalty payment.  
[17] **Q.** Is there an attachment to this e-mail as well?  
[18] **A.** Well, it refers to a direct license, and I assume what's on  
[19] the next page is a copy of the license.  
[20] **Q.** Now, if you look at Mr. Trent's e-mail to you, he's got  
[21] four numbered paragraphs; 1, 2, 3 and 4. Do you see that?  
[22] **A.** Yes.  
[23] **Q.** In paragraph number 1, it says, "Grant of rights, entire  
[24] catalog of owned or administered compositions, including all  
[25] performance reproduction and distribution rights necessary to

[1] deliver the service to business locations." Do you see that?  
[2] **A.** Yes, sir.  
[3] **Q.** And so just so there's no question, the word "performance"  
[4] is included in Mr. Trent's e-mail to you, correct?  
[5] **A.** It is.  
[6] **Q.** Now, did you, when you received this e-mail, did you  
[7] understand Mr. Smith to be requesting a performance rights  
[8] license from you?  
[9] **A.** No, I did not.  
[10] **Q.** And could you explain why not?  
[11] **A.** Again, for purposes of AMRA, AMRA doesn't create that, and  
[12] my understanding from previous situations with Mr. Smith is  
[13] he's somewhat, I want to say a low-level employee, at the risk  
[14] of sounding somewhat arrogant. Again, it's common that people  
[15] are somewhat loose, not very precise in correspondence about  
[16] rights.  
[17] I also don't professionally believe in the concept of  
[18] direct licensing, and I've been public about that over the  
[19] years.  
[20] **Q.** Did you have any comments when Mr. Smith -- did you have  
[21] any comments to the direct license that Mr. Smith sent to you?  
[22] **A.** I think I had a few comments that I had sent to him.  
[23] **Q.** And if you could turn to tab 3 of the binder. There's a  
[24] document there that's been marked as Joint Exhibit 1106. Do  
[25] you see that?

[1] **A.** Yes.  
[2] **Q.** Could you identify that document, please?  
[3] **A.** It's an e-mail from Mr. Smith responding to comments that I  
[4] had given him.  
[5] **Q.** Now, did any of your comments relate to which rights were  
[6] actually being provided under the license?  
[7] **A.** No.  
[8] **Q.** Did any of your comments relate to the royalty clause in  
[9] the contract?  
[10] **A.** No. And typically, these royalty provisions, they're not  
[11] negotiable.  
[12] **Q.** If you could take a look at tab 4 of your binder, please.  
[13] And there's a document there marked as Joint Exhibit 0437. Do  
[14] you see that?  
[15] **A.** Yes.  
[16] **Q.** And can you identify that, please?  
[17] **A.** This looks like an additional, another agreement between  
[18] DMX and me personally in regards to what I refer to as my  
[19] publishing clients, which is separate and apart from AMRA.  
[20] **Q.** Okay. Actually, if we could bypass that for just a moment  
[21] and go to tab 5. There's a document there marked as Joint  
[22] Exhibit 0171. Do you see that?  
[23] **A.** Yes.  
[24] **Q.** Could you identify that document, please?  
[25] **A.** This looks like, this is the agreement between DMX and

[1] AMRA.  
[2] Q. And if you could go to the last page of the document, is  
[3] that your signature there under the AMRA block?  
[4] A. Yes, it is.  
[5] Q. And when you signed this license on behalf of AMRA, what  
[6] rights did you believe you were providing to DMX?  
[7] A. Mechanical rights.  
[8] Q. And did you think you were providing performance rights to  
[9] DMX?  
[10] A. No, I did not.  
[11] Q. Have you subsequently learned whether or not the agreement  
[12] does include performance rights?  
[13] A. Well, I've learned that it did include performance rights.  
[14] Q. And after you learned that, did you cancel the license?  
[15] A. Yes, I have terminated it.  
[16] Q. When you signed this agreement, did you have any  
[17] understanding of what DMX's on and off-premises businesses  
[18] were?  
[19] A. I assumed it was similar, you know, to what once was called  
[20] elevator music, or Muzak is the company that I'm familiar with,  
[21] but there are countless internet providers that have these  
[22] types of agreements that I am approached by or have licenses  
[23] sent to me, so it's just not humanly possible to read line by  
[24] line all these things that it's been made very clear AMRA is a  
[25] mechanical rights society.

[1] Q. Good afternoon, Ms. Levin.  
[2] A. Hi.  
[3] Q. You are a veteran entertainment attorney, correct?  
[4] A. Yes, sir.  
[5] Q. And you're an active member of the State Bar of California?  
[6] A. Yes, I am.  
[7] Q. And you're also a music publisher, you said?  
[8] A. Yes. I make my living primarily as a music publisher. I'm  
[9] not -- I don't consider myself a practicing lawyer.  
[10] Q. And in your capacity as a music publisher, you administer  
[11] copyrights that are owned by other people, correct? That's  
[12] part of what you do?  
[13] A. Yes, sir.  
[14] Q. And another part of what you do as a music publisher is  
[15] license the compositions for which you own the copyright?  
[16] A. Well, there are certain copyrights that I personally own.  
[17] A majority of the publishing I do, though, I am an  
[18] administrator for other people's own copyright.  
[19] Q. Before you were a music publisher, you were in private  
[20] practice as an entertainment attorney?  
[21] A. I was in-house counsel and prior to that, I was in private  
[22] practice at a law firm.  
[23] Q. An entertainment law firm?  
[24] A. Yes.  
[25] Q. You hold yourself out to the marketplace as a

[1] Q. Did you have an understanding of whether DMX's on-premise  
[2] or off-premise service or both would be used to calculate your  
[3] royalties under this agreement at the time you signed it?  
[4] A. I assumed there would be a mechanical royalty paid.  
[5] Q. If you could take a look now back at tab 4, and I believe  
[6] you identified this as another direct license that you entered  
[7] into with DMX, correct?  
[8] A. Well, I didn't take it as a direct license, but yes, this  
[9] is an agreement between DMX and myself as a lawyer, and this  
[10] has to do with my music publishing company.  
[11] Q. When you signed this agreement, what rights did you believe  
[12] you were providing to DMX?  
[13] A. Mechanical rights, sir.  
[14] Q. Did you subsequently learn it included performance rights?  
[15] A. Yes, I have.  
[16] Q. What did you do when you learned that?  
[17] A. I terminated this agreement around the same time I  
[18] terminated the other. There was some question as to the proper  
[19] address and when the termination -- there's a rather onerous  
[20] termination agreement in here, but, yes, they were done within  
[21] a few days of each other.

[22] MR. FITZPATRICK: Thank you, Ms. Levin. I pass the  
[23] witness.

[24] CROSS-EXAMINATION

[25] BY MR. MARKS:

[1] well-respected authority that insures your clients will be  
[2] fairly compensated for their creative efforts, is that correct?  
[3] A. Yes.  
[4] Q. You own a music publishing called Sindee Levin Music?  
[5] A. It's an S Corp. in California that's a holding company for  
[6] the copyrights I personally own.  
[7] Q. You're affiliated with six or seven other publishing  
[8] company names?  
[9] A. That's probably right.  
[10] Q. And on behalf of these various music publishing entities,  
[11] you negotiate copyright licenses, correct?  
[12] A. You'd have to define what you mean by copyright licenses.  
[13] Generally, that is correct, though.  
[14] Q. For various different types of copyrights you negotiate  
[15] licenses, correct?  
[16] A. Yes, sir.  
[17] Q. And Sindee Levin Music has a website, correct?  
[18] A. Yes, it does.  
[19] Q. And on the website you advertise that Sindee Levin Music  
[20] offers high quality music fare at budget friendly rates,  
[21] correct?  
[22] A. Yes, but that's for synchronization licensing.  
[23] Q. And one of the ways that you compete in the marketplace for  
[24] synchronization rights is by offering those rights at a lower  
[25] price than some other people, correct?

(1) A. Yes.  
(2) Q. If I could turn your attention back to tab 2 of your  
(3) binder, which is Joint Exhibit 947.  
(4) A. Yes, sir.  
(5) Q. This is the e-mail that you received from Mr. Smith at MRI  
(6) on August 8, 2007, correct?  
(7) A. Yes, that's correct, sir.  
(8) Q. And you were previously acquainted with Ron Gertz and Doug  
(9) Brainin of MRI from other business activities at the time you  
(10) received this e-mail?  
(11) A. Yes.  
(12) Q. I'd like to turn your attention -- excuse me one second.  
(13) I'd like to show the witness Respondent's Exhibit 88. This is  
(14) an e-mail that you received from Mr. Smith on August 24, 2007?  
(15) A. Based on the information on here, yes.  
(16) Q. And Mr. Smith at MRI said that in connection with your  
(17) negotiation of the AMRA license, DMX would be willing to do  
(18) deals for as many of your music publishing clients as you like.  
(19) That's what you understood from this e-mail, correct?  
(20) A. Let me review it, please? At the top of it, it's talking  
(21) about the proper information for payees and proper tax  
(22) information. Okay. Yes, sir.  
(23) Q. You discussed over time not only the AMRA license, but a  
(24) license that would cover the other music publishing companies  
(25) for which you do own performance rights, correct?

(1) A. Yes. Barry and I had discussed that.  
(2) Q. If I could turn your attention to tab 4 of your binder and  
(3) Joint Exhibit 437. On page 5 of that agreement, you'll see  
(4) paragraph 6C, there's a provision that says, "Merger/No oral  
(5) amendments." Do you see that?  
(6) A. Yes, sir.  
(7) Q. And it states: "This agreement sets forth the entire  
(8) understanding between the parties with respect to the subject  
(9) matter hereof, and all prior and contemporaneous agreements are  
(10) merged herein," and then it continues. Do you see that?  
(11) A. Yes, sir.  
(12) Q. As an attorney, you understand that provision to mean that  
(13) whatever conversations you had prior to the execution of the  
(14) agreement, it's this agreement that controls the terms of the  
(15) contract between the parties, correct?  
(16) A. Yes.  
(17) MR. MARKS: Mr. Fitzpatrick points out to me that I  
(18) have not yet moved Respondent's Exhibit 88 into evidence, and I  
(19) do so now.  
(20) MR. FITZPATRICK: No objection, your Honor.  
(21) THE COURT: Received.  
(22) (Respondent's Exhibit RX 88 received in evidence)  
(23) Q. And if I could turn your attention to tab 5 of your binder,  
(24) Joint Exhibit 171.  
(25) A. Yes, sir.

(1) Q. That's the agreement that you executed on behalf of AMRA?  
(2) A. Yes.  
(3) Q. And then the whereas, in the third whereas clause, it  
(4) refers to licensee desiring to obtain from publisher a blanket  
(5) license for all necessary performance reproduction and  
(6) distribution rights implicated by the delivery of the service.  
(7) Do you see that?  
(8) A. Yes, sir.  
(9) Q. And the grant of rights in the service programming, it  
(10) states that the publisher is, among other things, seeking  
(11) performance rights?  
(12) A. That's what it says, sir.  
(13) Q. There's no confusion to you now reading the document about  
(14) what scope of rights was covered by this agreement, right?  
(15) A. I don't think it's very clear. These agreements are often,  
(16) again, drafted with broad terms and not very precise terms.  
(17) Q. As a veteran entertainment attorney, were you capable of  
(18) drafting language that would sharpen that -- that would  
(19) eliminate that confusion, weren't you?  
(20) A. Perhaps. I think, if there's no provision that this was a  
(21) direct performance license --  
(22) Q. If I could draw your attention to page 4 of the license?  
(23) In paragraph 5A, it's entitled mutual ability. Do you see  
(24) that?  
(25) A. Yes, sir.

(1) Q. It states, "Each party represents and warrants to the other  
(2) that it has full right, power and authority to enter into this  
(3) agreement and to perform its obligations hereunder." Do you  
(4) see that?  
(5) A. Yes, sir.  
(6) Q. Do you understand that to mean that you as the signatory on  
(7) behalf of AMRA were representing and warranting to DMX that you  
(8) had the rights provided in the scope of grant of rights in this  
(9) license?  
(10) A. This is boilerplate language, but yes.  
(11) Q. You understand as an attorney that that's what it meant,  
(12) correct?  
(13) A. Yes.  
(14) Q. The AMRA agreement that we're looking at, that was entered  
(15) into as of November 15, 2007, correct?  
(16) A. That's what it's dated.  
(17) Q. Is that approximately the time it was entered?  
(18) A. I would have no idea. These things are dated and it could  
(19) take months. It would not be unusual.  
(20) Q. Let me see if I could short circuit the need to wade  
(21) through lots of correspondence.  
(22) A. Okay.  
(23) Q. Am I correct that the agreement at tab 4 of your binder, JX  
(24) 437, was entered into some months after you had entered into  
(25) the AMRA agreement?

[1] A. Based on the dates, yes.  
[2] Q. Based on your recollection as well?  
[3] A. I really don't recall.  
[4] Q. If I could turn your attention to Schedule A of tab 4.  
[5] A. Okay.  
[6] Q. This is a list of various publishing entities.  
[7] A. Yes, it is.  
[8] Q. Some of which you either own or administer the rights for  
[9] the catalogs, and some of which you do not, correct?  
[10] A. That's correct.  
[11] Q. And the ones for which you do not own the rights are  
[12] crossed out of Schedule A?  
[13] A. Yes.  
[14] Q. And that's because you were excluding those from the scope  
[15] of the grant of rights that you were making in this agreement,  
[16] correct?  
[17] A. Most of these are former clients and companies I no longer  
[18] have any agreement with. Whether I ever had an agreement, I'm  
[19] not sure exactly where this entire list came from.  
[20] Q. Correct. But you reviewed the list and for people for whom  
[21] you didn't have authority to enter into the license, you  
[22] crossed them out, correct?  
[23] A. Yes.  
[24] Q. But you didn't cross out anything from the grant of rights  
[25] provision, did you?

[1] A. No. I did not make any changes there.  
[2] Q. And let's turn to the grant of rights provision 1A on the  
[3] first page of the agreement.  
[4] A. Yes.  
[5] Q. And it says, "Publisher hereby grants to licensee the right  
[6] to edit, reproduce, distribute and publicly perform any, some  
[7] or all of the musical compositions in publisher's catalog  
[8] solely in connection with the delivery of the service to  
[9] locations." Do you see that?  
[10] A. Yes.  
[11] Q. What is your understanding of the reference to the right to  
[12] publicly perform? That's the public performance right that you  
[13] otherwise license to BMI, correct?  
[14] A. My read of this is that they have the right to publicly  
[15] perform, but it doesn't mean necessarily without a license from  
[16] either ASCAP, BMI or SESAC. Just they can perform it.  
[17] Q. It's under the heading grant of rights, correct?  
[18] A. Yes, it is.  
[19] Q. They didn't need a separate right from anybody else to edit  
[20] the compositions, did they?  
[21] A. I'm not sure, sir, what you're asking.  
[22] Q. Well, I think it's clear from the document that the right  
[23] to publicly perform is included within the grant of rights, and  
[24] you I think are suggesting that they may need some other right  
[25] from somebody else to do that?

[1] A. Traditionally this type of language is used with the  
[2] understanding that there would be, one of the performing rights  
[3] organizations in the United States would be collecting  
[4] royalties from it. This is not unusual language or specific  
[5] language to what's referred to as direct licensing.  
[6] Q. You owned the public performance rights in the compositions  
[7] referred to --  
[8] A. I do not own the majority of them. I administer them.  
[9] Again, just the fact of you using language, language,  
[10] unfortunately, in this area of business and the law is used  
[11] very imprecisely, and people use, for instance, collection  
[12] rights, administrative rights, publishing right, ownership  
[13] right interchangeably, even though they are not, it's not  
[14] accurate. The same thing with they have the right to publicly  
[15] perform does not mean they have the right to collect for public  
[16] performances. There is a difference, a distinction.  
[17] Q. Your suggestion is there's a distinction when you grant  
[18] somebody the right to publicly perform a composition, what you  
[19] mean is they don't actually have the right to publicly perform  
[20] the composition, but they have to go get a license from  
[21] somebody else? Is that your testimony?  
[22] A. Yes. The inference is there. This is standard language in  
[23] agreements, and it doesn't mean that they are going to direct  
[24] license it.  
[25] Q. You're referring to an inference and that's based on

[1] something outside the language of the agreement?  
[2] A. It's industry standard and how these things are standardly  
[3] drafted. This in no place says that they will be circumventing  
[4] the PRO's.  
[5] Q. It in no place says it needs a separate license from a PRO,  
[6] does it?  
[7] A. Well, again, when you get to paragraph 2C about double  
[8] payment, they talk about the performing rights societies.  
[9] Q. Correct, and that's if they license it through a society,  
[10] they won't also pay you?  
[11] A. That's an industry standard. It gives a license to a  
[12] performing rights organization. Industry standard is not to be  
[13] doing direct licensing.  
[14] Q. I understand that's the industry standard, but you're not  
[15] suggesting that you are not allowed by BMI to enter into direct  
[16] licenses, are you?  
[17] A. I don't believe there's any restriction to do direct  
[18] licensing. My point is that this license is not clear that  
[19] they are doing direct licensing.  
[20] Q. And turning back to the grant of rights, is there some  
[21] other third party from whom DMX would need to go out and  
[22] separately obtain an additional right to edit your  
[23] compositions?  
[24] A. In terms of editing? No.  
[25] Q. Is there some other organization that DMX needed to secure

[1] separate permission to reproduce the compositions in your  
[2] catalogs that you either own or administer?  
[3] A. I'm assuming they're getting the rights for the master  
[4] recordings.  
[5] Q. But that's for the sound recording as opposed to the  
[6] musical composition?  
[7] A. Yes.  
[8] Q. I'm talking about the musical composition itself, the  
[9] rights that you own and administer. There's no reason to go  
[10] get a reproduction right after you've given them the  
[11] reproduction right, correct?  
[12] A. Not to my knowledge.  
[13] Q. And same question as to distribution. Once you grant them  
[14] the rights to distribute the musical compositions in the  
[15] catalogs you own or administer, they don't separately need to  
[16] go to anybody else to get the distribution right, do they?  
[17] A. I'll be honest with you. The way the internet is evolving,  
[18] it's unclear in terms of other rights that people need to have  
[19] or not. Again, this is standard language for most of these  
[20] mechanical licenses. I get countless licenses like this every  
[21] week.  
[22] Q. Sitting here today with regard to what you know about the  
[23] DMX service, you're not aware of anyone else they would need to  
[24] go to to get a separate distribution right in addition to what  
[25] you grant to them?

[1] A. Not off the top of my head.  
[2] Q. You learned subsequent to signing these agreements that  
[3] they did in fact include public performance rights? I believe  
[4] you testified to that a moment ago, is that correct?  
[5] A. Yes, sir.  
[6] Q. You learned they included public performance rights in a  
[7] conversation with Alison Smith of BMI, correct?  
[8] A. Yes, she had advised me of that.  
[9] (Continued next page)

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[1] BY MR. MARKS:  
[2] Q. And in that conversation, you told her that you had not  
[3] been previously aware that you granted public performance  
[4] rights to DMX?  
[5] A. That is correct.  
[6] Q. And at the time of that first conversation you weren't  
[7] aware that DMX and BMI were engaged in a rate court proceeding,  
[8] correct?  
[9] A. Correct.  
[10] Q. Ms. Smith asked you if you would speak to one of BMI's  
[11] lawyers, correct?  
[12] A. I don't know if it was in that conversation but at some  
[13] point in time she did ask me.  
[14] Q. Let's turn back to that initial conversation.  
[15] When you learned from Ms. Smith that the rights you  
[16] had granted to DMX included public performance rights, it is  
[17] after that conversation that you terminated the contracts,  
[18] correct?  
[19] A. It wasn't after that conversation. It was several months  
[20] afterwards they were terminated.  
[21] Q. So you learned that they included performance rights and  
[22] decided not to terminate the contracts, correct?  
[23] A. No, that's not true. It is just a matter of priority and  
[24] how many hours there are in the day and their termination  
[25] language is rather cumbersome.

[1] Q. It wasn't a sufficiently high priority that as soon as you  
[2] learned you immediately terminated?  
[3] A. I was trying to get an answer from Mr. Knittel where in  
[4] this agreement it stated that they were doing direct licensing  
[5] which I never really received a proper response.  
[6] Q. Is it your testimony that DMX was hiding the fact that it  
[7] was engaged in a direct license campaign?  
[8] A. Yes, I think they were somewhat hiding it. I don't think  
[9] they were forthright with it.  
[10] Q. Let's turn to tab 2 of your binder, Joint Exhibit 947.  
[11] A. Okay.  
[12] Q. Turning your attention to the first sentence of the second  
[13] paragraph it says: DMX, one of the largest suppliers of  
[14] background music services to business locations in the United  
[15] States, is seeking a catalog direct license with publishers  
[16] including all necessary performance and pre-production rights  
[17] in order to distribute the DMX service to business  
[18] establishments in the U.S., regardless of the delivery  
[19] methodology.  
[20] Do you see that?  
[21] A. Yes, sir.  
[22] Q. This is in fact an e-mail you received?  
[23] A. Yes.  
[24] Q. Is it still your testimony that DMX was hiding the fact  
[25] that it was seeking to engage in direct licensing and to

[1] acquire performance rights?

[2] **A.** I think they obscured it. It just said -- I mean, you are  
[3] asking me to look at the provision in the agreement that says  
[4] all the terms of the agreement are within the agreement and not  
[5] any external documentation. This is irrelevant. The reality  
[6] is I received most every day a minimum of 100 to 150 e-mails so  
[7] these get skimmed. And Mr. Smith is also, to my understanding,  
[8] an office, you know, a low level office clerk.

[9] **MR. MARKS:** No further questions.

[10] **MR. FITZPATRICK:** I have no questions, your Honor.

[11] **THE COURT:** Thank you, Ms. Levin. You are excused.

[12] **THE WITNESS:** Thank you very much, sir.

[13] (Witness steps down)

[14] **MR. FITZPATRICK:** Shall we call our next witness, your  
[15] Honor? BMI calls Ms. Helene Blue.

[16] **HELENE BLUE,**  
[17] called as a witness by the Petitioner,  
[18] having been duly sworn, testified as follows:

[19] **THE WITNESS:** Helene Blue. B-L-U-E.

[20] **DIRECT EXAMINATION**

[21] **BY MR. FITZPATRICK:**

[22] **Q.** Good afternoon, Ms. Blue.

[23] **A.** Good afternoon.

[24] **Q.** Would you please explain to the Court what you do for a  
[25] living?

[1] **A.** I'm a music publisher.

[2] **Q.** And what is Helene Blue Music?

[3] **A.** It's a firm that both publishes and administers copyrights.

[4] **Q.** How long has Helene Blue Music been around?

[5] **A.** Just about 15, maybe 16 years.

[6] **Q.** Did you start it?

[7] **A.** I did, indeed.

[8] **Q.** Where is it located?

[9] **A.** It is located on 33rd Street and Seventh Avenue.

[10] **Q.** How many people work for Helene Blue Music?

[11] **A.** Full-time, one.

[12] **Q.** Who is that?

[13] **A.** That's me.

[14] **Q.** How about part-time?

[15] **A.** And two part-time people. I have one who works  
[16] administration and royalties and one who does promotion.

[17] **Q.** And other than sole full-time employee, what is your  
[18] position at Helene Blue Music?

[19] **A.** Oh, I'm the president of the company.

[20] **Q.** Were you in the music publishing business before starting  
[21] Helene Blue Music?

[22] **A.** Indeed, I have been in the music publishing business for 41  
[23] years.

[24] **Q.** And, what did you do generally before starting Helene Blue  
[25] Music?

[1] **A.** Well, the job right before was worldwide general manager of  
[2] a company called MPL Publications and that's Paul McCartney's  
[3] publishing company, and before that there was a company called  
[4] Ark Music Group which represented wonderful jazz and rock and  
[5] roll songwriters, and before that was a company called Bellwin  
[6] Mills Publishing that was also a wonderful catalog of superb  
[7] writers, and on and on.

[8] **Q.** You can stop there.

[9] **A.** Thank you.

[10] **Q.** When you left the Paul McCartney Publishing Company to  
[11] found Helene Blue music, why did you do that?

[12] **A.** Well, I was at the end of a contract and as I was  
[13] renegotiating my rights with Paul I realized I was at an age  
[14] where if I didn't start my own company I would never do it.  
[15] And I just really wanted to do my own thing. And so, I  
[16] explained that to Paul and Linda and they were very generous  
[17] and not only said we won't do anything to stop you, we would  
[18] like you to represent us for the first couple of years to help  
[19] get you started.

[20] **Q.** So, what does, if you could explain it a in a little more  
[21] detail, what is it that Helene Blue Music does?

[22] **A.** Well, what any music publisher does. We represent the  
[23] copyrights. We are responsible for the basics of registering  
[24] copyrights with the copyright office in Washington, D.C., we  
[25] are responsible for promoting the songs, getting them out there

[1] to see that they might be in the days when artists covered  
[2] outside material, they might cover songs that you represent.  
[3] You get them out to the film companies, the production  
[4] companies that do television, the advertising agencies that do  
[5] commercials so they know what you have and, hopefully, so that  
[6] they will license the songs and they will earn money. And you  
[7] don't only do that in the United States, you are responsible  
[8] for those copyrights around the world.

[9] **Q.** Does Helene Blue Music own some copyrights and then  
[10] administer some copyrights on behalf of other people?

[11] **A.** I do indeed, yes.

[12] **Q.** And, could you explain that distinction?

[13] **A.** Yes.

[14] I have bought the rights to some copyrights and so I  
[15] own them, I am the publisher entirely but I do pay out, of  
[16] course, for some of them, it depends on the underlying deal,  
[17] the writer's share. And then there are many catalogs that I  
[18] administer.

[19] **Q.** And, can you explain the concept of the writer's share? We  
[20] haven't talked about that yet.

[21] **A.** Well, a composition is written by a songwriter and  
[22] songwriter's rights are in their song and, traditionally, let's  
[23] say for the sake of this discussion, for every dollar that's  
[24] collected 50 cents of that dollar is the songwriter's dollar,  
[25] 50 cents is the publisher's dollar. Now, of course that is

[1] dependent upon the underlying contract that you have made with  
[2] the songwriter. And so that number, those numbers can change  
[3] depending on the writer and depending on the underlying deal  
[4] that you have created.  
[5] Q. So, between the catalogs that you own and the catalogs that  
[6] you administer, about how many musical works are in there?  
[7] A. A lot. Probably between 5,000, 7,500. Somewhere. I have  
[8] not counted.  
[9] Q. Could you talk a little bit about what types of rights  
[10] Helene Blue Music licenses?  
[11] A. Mechanical rights, synchronization rights, digital download  
[12] rights, print rights. And, in some instances, grand rights.  
[13] Q. So, we just heard about mechanical and synch rights so I  
[14] won't make you repeat that, but could you explain digital  
[15] download rights, please?  
[16] A. Digital download is similar to mechanical in that we have  
[17] gone from a world of vinyl to a world of digital transmission,  
[18] and when people download songs either onto their computers or  
[19] onto their portable cell phones or -- that's digital  
[20] downloading -- and that's virtually taken over the industry.  
[21] Q. You also mentioned print rights. What are those?  
[22] A. Well, believe it or not there are still musicians out there  
[23] who want to learn songs from reading the sheet music, and print  
[24] rights are rights that I can grant to companies that specialize  
[25] in creating sheet music so that the works of a variety of the

[1] writers I represent can be in print.  
[2] Q. And you also mentioned grand rights. What are grand  
[3] rights?  
[4] A. Grand rights are very broad.  
[5] They can refer to opera, concerts, Broadway shows. I  
[6] don't any longer represent catalogs -- well, with one  
[7] exception, Jim Juan has written some Broadway shows where I  
[8] might get involved in the negotiations -- but I have licensed  
[9] certain songs that have been performed in Broadway shows and  
[10] musical reviews and I have licensed songs to ballet companies.  
[11] And those -- that's considered grand rights licensing.  
[12] Q. About, taking into account all these different kinds of  
[13] licenses, about how many licenses come through the offices of  
[14] Helene Blue Music in a given year?  
[15] A. It is a guesstimate. I would say around 3,000.  
[16] Q. Does Helene Blue Music ever license the public performance  
[17] right?  
[18] A. The word ever I'm underscoring. I have, especially when  
[19] certain television, particularly cable stations have had no  
[20] performance licenses. Then my synchronization license will  
[21] also include a performance right. But, by and large, my  
[22] performance rights are handled through the three societies in  
[23] the United States -- BMI, ASCAP and CSAC.  
[24] Q. And why do you do it that way? Why do you license the  
[25] performing rights through BMI, ASCAP and CSAC?

[1] A. Well, primarily because they're there and they do it so  
[2] well. They have been around for generations and they're  
[3] extraordinarily competent and I don't certainly, not in my  
[4] office would I have the ability to monitor all of the  
[5] performing rights that I would need to do.  
[6] Q. Ms. Blue, could I ask you, do you have a binder in front of  
[7] you? Great.  
[8] If you could turn to tab 1 of that binder and in there  
[9] is a document labeled Respondent's Exhibit RX 0082.  
[10] A. I see it.  
[11] Q. If you could take a look at that and identify it, please?  
[12] A. Yeah. It's an e-mail that was sent to me by Trent Smith.  
[13] MR. FITZPATRICK: I would move the admission of RX 82,  
[14] your Honor.  
[15] MR. MARKS: No objection.  
[16] THE COURT: Received.  
[17] (Respondent's Exhibit 82 received in evidence)  
[18] BY MR. FITZPATRICK:  
[19] Q. Ms. Blue, do you recall receiving this e-mail?  
[20] A. I do not recall receiving it but I have since been  
[21] reminded.  
[22] Q. Do you have any reason to doubt that you in fact did  
[23] receive it?  
[24] A. No, I have no reason to doubt.  
[25] Q. Did you know who Trent Smith was when you received the

[1] e-mail?  
[2] A. I did not.  
[3] Q. How about Music Reports, Inc., did you know what that was?  
[4] A. Yes, because I know Ron Gertz.  
[5] Q. And the e-mail mentioned DMX. Did you know what DMX was  
[6] when you received the e-mail?  
[7] A. I did not.  
[8] Q. And could you identify, is there an attachment to the  
[9] e-mail?  
[10] A. Yes.  
[11] Q. Could you identify that?  
[12] A. That's an agreement that was attached to license rights  
[13] between my company and DMX.  
[14] Q. And, if you could turn to tab 2 there is another document  
[15] there, this one is Joint Exhibit 0283. Do you see that?  
[16] A. Yes, I do.  
[17] Q. And could you identify that, please?  
[18] A. Again, that is the agreement and in this case it is the  
[19] signed agreement between us.  
[20] Q. And is that your signature on the last page of the  
[21] agreement?  
[22] A. Indeed, it is.  
[23] Q. Did you read this agreement before you signed it?  
[24] A. That's a very good question. I probably scanned the  
[25] agreement and I know I gave it to my assistant and said this

[1] looks like a digital download thing, does this look all right?  
[2] She said I will get back to you tomorrow; and she did and she  
[3] said, yeah, it is a basic digital download thing.  
[4] **Q.** And so, what did you believe the agreement was at the time  
[5] that you signed it?  
[6] **A.** That's what I believed that the agreement was a digital  
[7] download agreement.  
[8] **Q.** Did you negotiate any of the terms of the agreement before  
[9] signing it?  
[10] **A.** I did not.  
[11] **Q.** Did you have any communications at all with anyone at MRI  
[12] or DMX --  
[13] **A.** I did not.  
[14] **Q.** -- I'm sorry -- prior to signing it?  
[15] **A.** No.  
[16] **Q.** Did you understand that this agreement included the public  
[17] performance right?  
[18] **A.** I clearly did not read this agreement very carefully so I  
[19] did not.  
[20] **Q.** Did you have an understanding today?  
[21] **A.** I do, indeed.  
[22] **Q.** What is your understanding today?  
[23] **A.** That it does include it.  
[24] **Q.** Have you made any efforts to cancel the license?  
[25] **A.** I have not.

[1] **Q.** Why not?  
[2] **A.** It is a limited term agreement. I have no intention to  
[3] renew the agreement and I am embarrassed by my negligence.  
[4] **Q.** If you look at page 2 of the agreement there is, under  
[5] number 2 there, there is a section called Royalties.  
[6] **A.** Yes.  
[7] **Q.** And on 2A there is a paragraph called royalty pool. Do you  
[8] see that?  
[9] **A.** Yes.  
[10] **Q.** Did you review that paragraph before signing the agreement?  
[11] **A.** No. As I said to you, I did not read this agreement  
[12] carefully.  
[13] **Q.** Looking at that today, are you able to calculate what your  
[14] fees would be under this license?  
[15] **A.** If you would allow me I will take a moment to read it.  
[16] **Q.** Please.  
[17] **A.** But I am going to turn back to the other agreement which is  
[18] larger.  
[19] **Q.** Yes. Sorry. It is the same.  
[20] **A.** I am at an age where I need a little more help with the  
[21] reading.  
[22] **Q.** So, just to be clear, we are back on tab 1, the attachment  
[23] to the e-mail.  
[24] **A.** Correct.  
[25] **Q.** Page 2, paragraph 2A which is the same language?

[1] **A.** Correct.  
[2] They are indicating they will pay a pro rata share of  
[3] a pool of royalties multiplying a fee of \$6.25 by the number of  
[4] service locations that they have licensed.  
[5] **Q.** Do you know how many locations DMX has?  
[6] **A.** Well, they are -- no, I have no idea. I mean in the  
[7] agreement they talk about 100,000 but they -- I have no idea.  
[8] **Q.** Do you know what your share of performances is on DMX'  
[9] service?  
[10] **A.** No, I do not.  
[11] **Q.** When you signed the agreement do you have an understanding  
[12] of what DMX' on and off-premises services were?  
[13] **A.** I confess, I do not.  
[14] **Q.** And, did you have an understanding of whether your  
[15] royalties under this agreement would be calculated using the  
[16] on-premise, the off-premise or a combination of both?  
[17] **A.** No.  
[18] **MR. FITZPATRICK:** Thank you, Ms. Blue. I pass the  
[19] witness, your Honor.  
[20] **CROSS EXAMINATION**  
[21] **BY MR. MARKS:**  
[22] **Q.** Good day, Ms. Blue.  
[23] **A.** Hello.  
[24] **Q.** You referred a moment ago in your direct testimony to an  
[25] assistant who reviewed the contract for you, correct?

[1] **A.** Correct.  
[2] **Q.** Is that Deborah Evans?  
[3] **A.** That is correct.  
[4] **Q.** And Deborah Evans has been employed by Helene Blue Music  
[5] for about six years?  
[6] **A.** Yes. I think even longer.  
[7] **Q.** How long do you think she has been employed with you?  
[8] **A.** I think seven.  
[9] **Q.** And she had experience in the music publishing field before  
[10] being employed by you?  
[11] **A.** Yes, she does.  
[12] **Q.** That was about 10 years of prior experience before she  
[13] started with Helene Blue Music?  
[14] **A.** That's correct.  
[15] **Q.** You also testified during your direct examination about  
[16] granting public performance rights to cable television  
[17] networks?  
[18] **A.** That's correct.  
[19] **Q.** And those are the public performance rights that if you  
[20] don't grant a direct license are typically acquired from a  
[21] performing rights organization such as ASCAP, BMI, or CSAC?  
[22] **A.** That's correct.  
[23] **Q.** And you offered direct licenses to those entities that  
[24] didn't want to take the license through the PRO, correct?  
[25] **A.** That is correct.

[1] Q. You were not misled by anybody at DMX or MRI as to the  
[2] nature of the agreement you were signing, correct?  
[3] A. I didn't say that. I specifically said I made an error.  
[4] Q. I just wanted to clarify that. I wasn't accusing you of  
[5] saying anything or not saying anything.  
[6] You first learned that BMI was litigating a rate court  
[7] proceeding against DMX last year when you received a telephone  
[8] call from one of BMI's lawyers?  
[9] A. That's correct.  
[10] Q. And at the time of that call you didn't know anything about  
[11] DMX?  
[12] A. I did not.  
[13] Q. And that's when you first realized that the license you  
[14] signed included the performance rights?  
[15] A. Indeed.  
[16] MR. MARKS: I have no further questions.  
[17] MR. FITZPATRICK: No questions, your Honor.  
[18] THE COURT: Thank you, Ms. Blue. You are excused.  
[19] THE WITNESS: Thank you.  
[20] MR. FITZPATRICK: Your Honor, we do have another  
[21] witness. Would you prefer to take an earlier lunch break or  
[22] would you prefer to start with the next witness?  
[23] THE COURT: That's perfectly okay with me.  
[24] MR. FITZPATRICK: I'm sorry. I didn't hear you.  
[25] THE COURT: The lunch break is not entirely within my

[1] control. I have got, during that we have a meeting of the  
[2] grievance committee of which I happen to be a member and I  
[3] really can't leave that until it is over. So, we will have to  
[4] resume at about 2:00 anyway. If you want to fill in the time  
[5] between now and then with something else, fine. And if you are  
[6] not prepared to do that, we will stop now.  
[7] MR. FITZPATRICK: We will call our witness, your  
[8] Honor.  
[9] MR. BENTON: Your Honor, BMI calls Mr. Milton Laughlin  
[10] to the stand.  
[11] THE COURT: I have to stop again about a quarter to  
[12] 1:00, in any event.  
[13] MILTON LAUGHLIN,  
[14] called as a witness by the Petitioner,  
[15] having been duly sworn, testified as follows:  
[16] THE WITNESS: Milton Laughlin, L A U G H L I N.  
[17] MR. BENTON: Your Honor, may I approach with the  
[18] binders?  
[19] THE COURT: Yes.  
[20] DIRECT EXAMINATION  
[21] BY MR. BENTON:  
[22] Q. Good morning, Mr. Laughlin.  
[23] A. Good morning.  
[24] Q. Are you currently employed by BMI?  
[25] A. Yes, I am.

[1] Q. And, how long have you been working at BMI?  
[2] A. 15 years.  
[3] Q. And what is your current position?  
[4] A. I'm senior vice president of IT and operations.  
[5] Q. And what is IT?  
[6] A. IT is our information technology department, it is  
[7] responsible for all the computer infrastructure within the  
[8] company including hardware, communications, networking, system  
[9] applications, and programming.  
[10] Q. And, how long have you been in your current position?  
[11] A. Three years.  
[12] Q. Prior to becoming senior vice president, what was your  
[13] position?  
[14] A. I was vice president of IT and operations.  
[15] Q. And when did you become vice president?  
[16] A. I don't recall the exact day.  
[17] Q. Before working at BMI, how were you employed?  
[18] A. I worked for MCA Universal for five years prior to coming  
[19] to BMI and 23 years with Capitol Records EMI.  
[20] Q. And what types of companies are those?  
[21] A. Record labels.  
[22] Q. How many employees are in BMI's IT operations department?  
[23] A. 178.  
[24] Q. Are you in charge of all of them?  
[25] A. Yes, I am.

[1] Q. Mr. Laughlin, what are your current responsibilities as  
[2] senior vice president of operations, information technology?  
[3] A. I oversee, from an IT perspective, all their budgets, all  
[4] their development, prioritization, approval of projects that we  
[5] work on on behalf of the company. On the operations side also  
[6] responsible for all of the budgets and the departments that  
[7] process music use information, registrations, and all the  
[8] documentation that we receive in that we need to process for  
[9] doing distributions to our affiliates.  
[10] Q. And you mentioned development. What did you mean by  
[11] development?  
[12] A. The writing of new computer applications or modifications  
[13] to existing ones that we have based upon business requests that  
[14] we get from within the company.  
[15] Q. So, that's programming new software applications?  
[16] A. That is correct.  
[17] Q. Does that include databases?  
[18] A. That is correct.  
[19] Q. And you oversee the budget for that?  
[20] A. Yes, I do.  
[21] Q. Can you explain when programming is necessary for a project  
[22] at BMI what that programming generally entails?  
[23] A. Well, we get a request from either a business unit within  
[24] the company or sometimes an outside request that we may get as  
[25] well. We have to formulate by reviewing what those business

[1] requirements are and whether they touch existing systems that  
[2] we have or it is the development of newer systems. And then we  
[3] estimate what the costs of those are so that we can go through  
[4] the budget process for approvals and also scheduling for  
[5] priorities into which projects have certain timelines  
[6] associated with them.

[7] Q. And, with respect to this programming, as the senior vice  
[8] president, what are your specific responsibilities?

[9] A. To oversee the direction of the projects, the  
[10] prioritizations and the budgets, primarily.

[11] Q. And, does your department have programmers that are  
[12] employees at BMI?

[13] A. Yes, they are.

[14] Q. Approximately how many?

[15] A. Approximately 25.

[16] Q. And, does your department also use any programmers that are  
[17] not BMI employees?

[18] A. Yes, we do.

[19] Q. Can you explain how that works?

[20] A. We occasionally have a couple of firms that we deal with  
[21] where we get outside consultant programmers. A lot of that is  
[22] based upon the skill sets necessary for individual projects  
[23] that we are working on and we use approximately three or four  
[24] firms throughout the year that we contract programmers, as  
[25] necessary.

[1] Q. And, is there a general rate that you pay these outside  
[2] consultant programmers?

[3] A. Yes; \$75 an hour.

[4] Q. And, does that go to the programmers or to the firms that  
[5] you have engaged in?

[6] A. No, that goes to the firms. They are employees of the  
[7] firms.

[8] Q. And, is it typical to use such outside consultant  
[9] programmers on new projects that require a programmer?

[10] A. That is correct.

[11] Q. And, do you also use BMI's internal programmers?

[12] A. Yes, we do.

[13] Q. Mr. Laughlin, do you know generally what the commercial  
[14] music services industry is?

[15] A. Yes. It's a company that provides music to other  
[16] businesses such a guest hotels and restaurants.

[17] Q. Do you know of any specific members of that industry?

[18] A. DMX and Muzak are the only two that I'm familiar with a  
[19] little bit.

[20] Q. And, putting aside the license that is at issue in this  
[21] proceeding, does your department have any role with respect to  
[22] the processing of performance data for members of the  
[23] commercial and music services industry?

[24] A. Yes, they do.

[25] Q. Can you tell me what that role is?

[1] A. Yes.

[2] We have a department within the operations department  
[3] that processes all the music use reports received from various  
[4] licensees including the commercial music service licensees.

[5] They process the information through a set of systems that  
[6] we've constructed in order to do what we call title  
[7] identification so we can identify the songs that are being used  
[8] within play lists or other forms of media that they submit to  
[9] us to identify, for the end of that result being that  
[10] processing those things through our royalty distribution for  
[11] those works that are compensable from BMI.

[12] Q. And is that what's generally done for all members of the  
[13] commercial music services industry now, from your department's  
[14] perspective?

[15] A. That is correct.

[16] Q. And you mentioned music use reports. What do you mean when  
[17] you say music use reports?

[18] A. Well, licensees are required -- or some licensees are  
[19] required to submit music use reports. They have to report to  
[20] BMI what was actually being performed within the licenses that  
[21] they have with BMI.

[22] Q. And in what form do they typically report that music use?

[23] A. There is various different ways that we get them submitted.

[24] There are standard formats that some industries will follow.

[25] Q. What about the commercial music service industry?

[1] A. The commercial music service industry, they send us files  
[2] with play list information and distribution lists which tells  
[3] us who purchases the services that they offer.

[4] Q. These are electronic files?

[5] A. Yes, they are.

[6] Q. Are these basically electronic files that contain thousands  
[7] and thousands of performances?

[8] A. Yes. I mean, they can be pretty big files depending on  
[9] what the time period from the reporting period is and how many  
[10] playlists or programs that they have. So, it can be tens of  
[11] thousands of records that you receive that we have to process  
[12] through our system.

[13] Q. Okay, you mentioned DMX earlier. Do you know, again,  
[14] putting aside the license that is at issue in this case for a  
[15] moment, how DMX has customarily provided BMI with performance  
[16] data for its commercial music services?

[17] A. Yes, I do.

[18] Q. And, could you tell me how they've done so for their  
[19] off-premises services?

[20] A. Yes.

[21] their off-premise services is their satellite  
[22] delivery, and they provide us with a hundred or so channels.  
[23] Each channel contains the individual musical compositions that  
[24] make up each of those channels. And that's the only  
[25] information that they provide to us.

[1] Q. And, does DMX provide for you for the off-premise satellite  
[2] channels the number of locations that receive each channel?  
[3] A. No, they do not.  
[4] Q. And, now, does DMX also have on-premises services?  
[5] A. That is correct.  
[6] Q. And what are on-premises services?  
[7] A. That is the physical delivery of product either from CDs or  
[8] hard drives that are used by the retail establishment. They  
[9] give us playlist programs similar to the channels that are  
[10] created on the off-premise side but unlike the off-premise side  
[11] we do get a distribution count list of customers that equates  
[12] to who does -- who subscribes to which service of those  
[13] individual programs.  
[14] Q. Does that allow BMI to have information about the  
[15] popularity of the different programs in the on-premises  
[16] services?  
[17] A. Yes, that is correct. We utilize -- we utilize that in  
[18] order to calculate the performance counts for each of the  
[19] individual works that are associated within each playlist, and  
[20] naturally if one playlist has a larger customer count of  
[21] subscribing to then another it would have a higher performance  
[22] count per each of the individual songs within that -- within  
[23] that play list.  
[24] Q. And, for DMX' satellite or off-premises, are you able to do  
[25] the same?

[1] A. No, we are not.  
[2] Q. You also mentioned Muzak. Do you know how Muzak reports  
[3] performance data to BMI?  
[4] A. Yes, I do.  
[5] Q. Can you tell me how it does for its on-premises services?  
[6] A. It is the same thing we get from DMX. We get the programs,  
[7] the playlist, as well as the distribution list that tells us  
[8] how to equate the performances when processing through  
[9] distribution.  
[10] Q. So, for Muzak they also give you a list of the locations  
[11] for on-premises --  
[12] A. That's correct.  
[13] Q. -- services, what business locations those particular  
[14] programs went to?  
[15] A. That's correct.  
[16] Q. And how does Muzak report performances for its off-premises  
[17] services?  
[18] A. They follow the same routine as they do for the on where  
[19] they actually give us the channels or playlist information for  
[20] the stuff that's delivered via satellite but they do, unlike  
[21] what DMX does, give us the customer count information so that  
[22] we can actually calculate the performance counts for the  
[23] on-premise just as accurate -- for the off-premise just as  
[24] accurately as we do for the on.  
[25] Q. And, Mr. Laughlin, are you familiar with the adjustable fee

[1] blanket license or AFBL that is at issue in this proceeding?  
[2] A. Yes, I am.  
[3] Q. And, do you have any role with respect to the AFBL for DMX?  
[4] A. Yes, I do.  
[5] Q. As a general matter, what is your role?  
[6] A. My role is to evaluate what the license will contain for  
[7] the purposes of any software development or operational needs  
[8] that will be necessary in order to comply with what the license  
[9] dictates.  
[10] Q. Will you also -- and by you I mean you and your  
[11] department -- have any responsibilities for the ongoing  
[12] implementation of the AFBL for DMX?  
[13] A. Yes. Depending upon -- depending upon what would be  
[14] required from a continuing processing criteria different from  
[15] what you would do initially to get the new license implemented  
[16] there will be -- there will be requirements necessary to  
[17] support it on an ongoing basis.  
[18] Q. Now, you mentioned first that your department will develop  
[19] the AFBL or will develop software for the AFBL; let's turn to  
[20] that topic.  
[21] Will DMX' AFBL require any additional systems to be  
[22] developed by BMI beyond what BMI currently uses for the  
[23] traditional blanket license?  
[24] A. Yes, it will.  
[25] Q. And if you could turn to tab 1 in your binder? Are you

[1] with me?  
[2] A. Yes.  
[3] Q. Can you identify this document?  
[4] A. Yes. What this document is, it's a processing flow diagram  
[5] of a portion of our distribution process as well as the there  
[6] are elements that will need to be incorporated in order to  
[7] support the AFBL license.  
[8] Q. Does this show the existing systems at BMI and the new  
[9] systems at BMI that are being put in place for DMX' AFBL?  
[10] A. That is correct.  
[11] Q. And, has BMI begun to put this process into place?  
[12] A. Yes, we have.  
[13] Q. So programming has been started?  
[14] A. That is correct.  
[15] Q. Using this document, can you tell us where the AFBL process  
[16] for DMX begins?  
[17] THE COURT: I'm not sure I have the right document,  
[18] Mr. Benton.  
[19] MR. BENTON: I'm sorry, your Honor.  
[20] THE COURT: Just point me to it again.  
[21] MR. BENTON: It is at tab 1 and it is a very colorful  
[22] flowchart and I can get you another binder if you don't have  
[23] the correct one.  
[24] THE COURT: Tab 1 I have the pictures and the data  
[25] about Mr. Laughlin.

[11] **MR. BENTON:** Yes, your Honor. I'm not --  
 [12] **THE COURT:** Ah, it is a different tab 1. Does it  
 [13] start "Invoice"? No.  
 [14] **MR. BENTON:** May I approach, your Honor?  
 [15] **THE COURT:** Yes.  
 [16] **MR. BENTON:** Your Honor, I think that what you might  
 [17] have is a binder from the deposition of Mr. Laughlin, if I  
 [18] could get it back?  
 [19] **THE COURT:** Yes.  
 [20] **MR. BENTON:** I do apologize, your Honor.  
 [21] **THE COURT:** Okay. I have got you.  
 [22] **BY MR. BENTON:**  
 [23] **Q.** So, at tab 1, Mr. Laughlin, can you please tell us where  
 [24] the AFBL process starts for the DMX AFBL license?  
 [25] **A.** There is primarily two starting points. There is a  
 starting point in the tan box A by the red arrow that says  
 start, and in the blue box B under the red arrow start of  
 submission of the AFBL reports.  
**Q.** Okay, so there is two starting places. Why are there two  
 starting places?  
**A.** There are two starting places because box A, which is the  
 tan colored box, is the process that we utilize in order to  
 process the direct license agreement that we have received from  
 DMX MRI that equate to the direct license. The submitted AFBL  
 reports are the reports that were established that gives us the

[11] this chart is the current management of the direct licenses  
 [12] under the interim fee regime? Is that correct?  
 [13] **THE WITNESS:** That is correct.  
 [14] **THE COURT:** I see.  
 [15] **BY MR. BENTON:**  
 [16] **Q.** So, let's turn to the first starting place that you  
 [17] mentioned, Mr. Laughlin, which is the box labeled A which is  
 [18] tan. What does this box generally contain?  
 [19] **A.** It's the process that we used to take in the direct license  
 [20] agreements, go through a validation process and enter them into  
 [21] a database that can be used further by other systems that need  
 [22] to interrogate the validity of the direct licenses.  
 [23] **Q.** And what is the first step in this process?  
 [24] **A.** We receive the submitted direct license reports from MRI or  
 [25] DMX. They're customarily paper forms that have numbers on them  
 so that it will be easily be tracked once we put them into our  
 system.  
 That's the first step.  
**Q.** And do those direct licenses typically contain one direct  
 licensing publisher name or multiple?  
**A.** In the validation process what we need to do is there are  
 certain elements within the direct license that we need to  
 validate, one of them being to make sure that it is  
 representative of the performing right and not just mechanical  
 or sync rights. We need to know what the start and end date of

[11] credit reports plus the musical composition reports that we get  
 [12] for further processing within distribution according to the  
 [13] agreed upon standards worked out in the interim agreement.  
 [14] **THE COURT:** Excuse me a moment.  
 [15] Would you read back that answer, slowly?  
 [16] (Record read)  
 [17] **MR. BENTON:** We will work through it, your Honor.  
 [18] **THE COURT:** I think we will have to.  
 [19] **MR. BENTON:** Yes, I think so, but it will work out.  
 [20] **BY MR. BENTON:**  
 [21] **Q.** So, Mr. Laughlin, before I get to my next question, you  
 [22] mentioned MRI?  
 [23] **A.** Yes.  
 [24] **Q.** And who is MRI?  
 [25] **A.** I don't know what the acronym stands for but they're a  
 customer of DMX as well as we have experienced with them in the  
 TV per-program industry.  
**Q.** When you said they're a customer of DMX, do you mean that  
 they're working with DMX?  
**A.** That's correct.  
**Q.** And with respect to His Honor's interim fee decision, has  
 it been MRI that's been sending interim fee data to BMI on  
 behalf of DMX?  
**A.** That is correct.  
**THE COURT:** So that what is represented in box A on

[11] the agreement is so that it is in the time frame that we need  
 [12] for processing. It has got to be signed by a legal  
 [13] representative of the publisher that issued it. And, in every  
 [14] one of the ones that we process, most of them only reference  
 [15] one publisher name that this agreement has been executed with.  
 [16] **Q.** Okay, Mr. Laughlin, so now you are referring --  
 [17] **THE COURT:** Excuse me, Mr. Benton.  
 [18] **MR. BENTON:** Yes.  
 [19] **THE COURT:** But box A represents a series of  
 [20] procedures that only has to be gone through once for each  
 [21] direct license, is that correct?  
 [22] **THE WITNESS:** That's correct.  
 [23] **THE COURT:** It is not an ongoing activity at all?  
 [24] **THE WITNESS:** The only way it would be an ongoing --  
 [25] **THE COURT:** With respect to the individual license.  
**THE WITNESS:** There may be times where corrections  
 need to be made if a license expires and you get an extension.  
**THE COURT:** But, otherwise, this process is gone  
 through once with respect to every direct license and then it  
 is complete?  
**THE WITNESS:** That is correct.  
**THE COURT:** Okay.  
**BY MR. BENTON:**  
**Q.** And so, the process you are talking about now, the  
 validation process --

[1] **THE COURT:** Mr. Benton, whenever you get to a point.  
[2] **MR. BENTON:** It would be okay now.  
[3] **MR. MARKS:** We will suspend until as near 2:00 as I  
[4] can make.  
[5] **MR. BENTON:** Very good, your Honor.  
[6] (Luncheon recess)  
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[1] AFTERNOON SESSION  
[2] (2:30 p.m.)  
[3] **THE COURT:** I apologize to all of you, it took a great  
[4] deal longer than usual, and there was nothing I could do about  
[5] it.  
[6] **MR. BENTON:** May I proceed, your Honor?  
[7] **THE COURT:** Yes.  
[8] **BY MR. BENTON:**  
[9] **Q.** Mr. Laughlin, right before we broke, I think we were  
[10] talking about the document at tab 1 at the validation process  
[11] stage, is that correct?  
[12] **A.** That's correct.  
[13] **Q.** And you had described a manual review of the paper direct  
[14] licenses that came into BMI. Has BMI completed its manual  
[15] review of the direct licenses that DMX has submitted to it to  
[16] date?  
[17] **A.** Yes, we have.  
[18] **Q.** And what were the results of that review?  
[19] **A.** In the first batch we had approximately 100 of them that  
[20] contained errors, either with start and end dates that weren't  
[21] legible. We had some titled parties or publishers, the names  
[22] that were referenced on the direct licenses, we had no idea who  
[23] they were, and there were some signature issues.  
[24] Out of that batch we submitted, we received a response  
[25] back correcting most of those, with the exception of

[1] approximately 28 of them which are still outstanding, and  
[2] there's a second batch where we had 44 that were rejected where  
[3] we've gotten no response back to date.  
[4] **Q.** Okay. So you said you got a response to a first batch.  
[5] Does that mean, did BMI inform DMX of its perceived errors in  
[6] the direct licenses?  
[7] **A.** That's correct.  
[8] **Q.** At some point did DMX respond back to BMI?  
[9] **A.** We did receive a response back, yes.  
[10] **Q.** Do you know when that was?  
[11] **A.** I believe it was the beginning of August.  
[12] **Q.** And I think you said in that first batch there were still  
[13] 28 agreements where there was some issue. What was the issue  
[14] with those 28 remaining agreements?  
[15] **A.** I think the majority of the issue with them was that we  
[16] received an explanation to the name that was referenced in the  
[17] agreement as to TBD, which somebody apparently didn't know who  
[18] this was either that was on the agreement, as well as what we  
[19] could have.  
[20] **Q.** Do you mean that DMX didn't know who was in the agreement?  
[21] **A.** Right.  
[22] **Q.** At this validation step of the process, beyond the manual  
[23] review you've described, is there any automated review that's  
[24] necessary?  
[25] **A.** Yes. I mean, one of the things that's challenging about

[1] putting this together is the fact that you do have only one  
[2] account number listed on the agreements, and as we know, a  
[3] single account has many either subaccounts or administrative  
[4] accounts that basically link to this parent or primary account.  
[5] I mean, for an example, Bug Music has a direct license. We got  
[6] the SDL in and it referenced Bug Music. Well, we've got  
[7] several hundreds of accounts of Bug Music that were set up with  
[8] individual catalogs at the request of Bug Music. Also, there  
[9] are at least over 800 accounts that they actually administer,  
[10] so all of the accounts, since the direct licenses cover  
[11] anything that's owned or administered, we had to insure that we  
[12] could take all of these accounts and put them within that  
[13] direct license so that later on when we're validating royalties  
[14] to be removed, we knew which accounts had earnings.  
[15] **Q.** Okay. Now, you mentioned account numbers. What is an  
[16] account number?  
[17] **A.** Every affiliate that's on the BMI database has an account  
[18] number.  
[19] **Q.** So do you mean in this instance, account number means  
[20] publisher?  
[21] **A.** That's correct.  
[22] **Q.** And you also used the term SDL. What do you mean by that  
[23] term?  
[24] **A.** Source or direct license.  
[25] **Q.** Are there source license?

[1] A. No, it's just direct licenses.  
[2] Q. Sorry. Are there source licenses that are at issue in this  
[3] proceeding?  
[4] A. No.  
[5] Q. So when you referred to DMX in the context of DMX's AFBL,  
[6] you're just referring to direct licenses?  
[7] A. Yes.  
[8] Q. Am I correct that account numbers are publishers, meaning  
[9] the account has a single publisher name on it when it's  
[10] submitted from DMX to BMI?  
[11] A. Yes.  
[12] Q. And then BMI has to link that publisher name to all the  
[13] owned and administered accounts, is that correct?  
[14] A. That is correct.  
[15] Q. And is this a process that required programming from BMI to  
[16] accomplish for the DMX AFBL?  
[17] A. Yes, it did.  
[18] Q. Has this programming been done?  
[19] A. Yes, it has.  
[20] Q. And when was it done?  
[21] A. It was done, started in August of '09.  
[22] Q. Okay. And this is the programming that was done for the  
[23] linking of the publishers that you've described?  
[24] A. That's correct.  
[25] Q. And where is this on tab 1, this document?

[1] A. It's in the A section under group account structure, the  
[2] yellow box.  
[3] Q. This box is shaded yellow as you've indicated. Why is  
[4] that?  
[5] A. All the boxes that are yellow on here means there was  
[6] development done in support of the AFBL.  
[7] Q. So across the chart in the boxes that are shaded in yellow,  
[8] that means that programming has been done to date?  
[9] A. That's correct.  
[10] Q. And BMI has incurred costs in doing that programming?  
[11] A. Yes.  
[12] Q. While we're at it, some of these boxes don't have any  
[13] shading. They're just in white. What does that mean?  
[14] A. Those are either processes or applications where we didn't  
[15] have to make any modifications in order to incorporate part of  
[16] the AFBL.  
[17] Q. So does that mean that's an existing process at BMI that  
[18] doesn't require any additional costs to BMI specific to DMX's  
[19] AFBL?  
[20] A. That's correct.  
[21] Q. And just to round it out, the last shading is in orange.  
[22] What does that mean?  
[23] A. Those are activities that we need to complete in the future  
[24] that we haven't started.  
[25] Q. So you anticipate for the orange boxes that some

[1] programming will be necessary, is that correct?  
[2] A. That is correct.  
[3] Q. But that program hasn't been started yet?  
[4] A. No, it has not.  
[5] Q. After the creation of this group account structure and in  
[6] the process, the linking of --  
[7] THE COURT: Excuse me a moment, Mr. Benton.  
[8] MR. BENTON: Yes.  
[9] THE COURT: The orange box that leads to the I's, the  
[10] ones in the tan section that says reject directly resolution  
[11] protocol, does that mean that you're simply holding that place  
[12] for the establishment of a procedure about leases that you  
[13] reject when and if that problem arises?  
[14] THE WITNESS: Yes, that is correct.  
[15] THE COURT: Thank you.  
[16] Q. And so once this validation process that you've described  
[17] has been completed, what's the next step in the process?  
[18] A. We enter them into the direct license database that's been  
[19] created, which will, some of that information would be manually  
[20] created into the database. Some of it is a direct feed from  
[21] the group account structure, depending on if somebody linked  
[22] that direct license to one of those huge groups and needs to  
[23] carry it over into the database.  
[24] Q. And was programming necessary for this step of the process?  
[25] A. Yes, it was.

[1] Q. Has that programming been completed?  
[2] A. Yes, it was.  
[3] Q. Has the direct licenses that DMX has submitted to BMI to  
[4] date, have they been entered into this direct license database?  
[5] A. Yes, they have.  
[6] Q. And who did that?  
[7] A. Peg Farthing.  
[8] Q. Who is Ms. Farthing?  
[9] A. She's a director that works with strategic operations.  
[10] Q. Do you know how long Ms. Farthing spent on this?  
[11] A. About 126 hours at a cost of \$8,800.  
[12] Q. Now, is this entry into the direct license database, is  
[13] this something that your operations IT department will be  
[14] responsible for on a going-forward basis?  
[15] A. No, it will not.  
[16] Q. Do you know what department will be responsible for that  
[17] entry?  
[18] A. The licensing department.  
[19] Q. And so from your department's perspective, have all the  
[20] costs been incurred to date, are they basically completed for  
[21] this step?  
[22] A. That is correct.  
[23] Q. And was programming necessary to make the database itself  
[24] for the direct licenses?  
[25] A. No, it was not.

[1] Q. And was this an existing database at BMI?  
[2] A. Yes, it was.  
[3] Q. Could you explain that?  
[4] A. We already had a direct license database set up in order to  
[5] house the TV program direct licenses and other direct licenses  
[6] that we've received.  
[7] Q. Were enhancements to this database, programming  
[8] enhancements necessary specific to DMX's AFBL?  
[9] A. Yes.  
[10] Q. And have those been completed?  
[11] A. Yes, they have.  
[12] Q. And under that it says accepted or rejected. If a license  
[13] is rejected, his Honor asked a question about this, what's the  
[14] next step in that process?  
[15] A. It gets communicated to, back to MRI with a resolution  
[16] saying that it's been rejected, the reasons why it's been  
[17] rejected and then wait for some response to come back so that  
[18] we can update the database, potentially change the status of  
[19] that direct license from rejected to accepted if the issue's  
[20] been resolved.  
[21] Q. Do you anticipate that programming will be necessary for  
[22] this step?  
[23] A. We would like to set up an automated process to do this,  
[24] rather than manually passing papers back and forth. And that  
[25] would require some programming to develop an interface between

[1] files we would create. We would probably put them out there  
[2] into some site that MRI or DMX would pick up, you know, that  
[3] file from us.  
[4] Q. So this is a program you anticipate in the future?  
[5] A. Yes.  
[6] Q. Do you anticipate that you would work with MRI and DMX in  
[7] creating this resolution process and the software necessary?  
[8] A. Yes. Yes, we would.  
[9] Q. Now, you said there were two starting places. Can you tell  
[10] me where the other starting place is on this chart?  
[11] A. It's up in box B, under, where submitted AFBL reports.  
[12] Q. I apologize. I forgot to ask if a direct license is  
[13] accepted, in other words, if BMI enters it into its database  
[14] and there's not a problem with it, what's the next step in the  
[15] process?  
[16] A. The direct license is just keyed into the database. It's  
[17] got a flag on it saying it's accepted, and then later on in the  
[18] process when we're validating performance information against  
[19] the direct license database, those would be the ones that would  
[20] be interrogated.  
[21] Q. And I'm sorry, going back to the other starting point,  
[22] could you tell me what that is again?  
[23] A. That's where we get the submitted AFBL reports in from MRI.  
[24] Q. And are these reports music performance information?  
[25] A. Yes.

[1] Q. And will they contain the claimed credits?  
[2] A. That's correct.  
[3] Q. And have you been receiving music use reports on an interim  
[4] basis from MRI?  
[5] A. Yes, we have.  
[6] Q. And so the first step in that process is submitted AFBL  
[7] reports. Does that just mean okay, the reports come in?  
[8] A. That's correct.  
[9] Q. And what's the next step in the process?  
[10] A. We load it into a brand new database that we've created  
[11] where we're going to store and house all the information that  
[12] comes in from the submitted file, along with an extensive array  
[13] of other data elements that we will use during the process when  
[14] we're validating the information that is within that file that  
[15] was submitted.  
[16] Q. Okay. And is this database that you need to create, have  
[17] you in fact created it?  
[18] A. Yes, we have.  
[19] Q. And has programming been done?  
[20] A. Yes.  
[21] THE COURT: Come up counsel, please.  
[22] (Discussion off the record at the sidebar)  
[23] BY MR. BENTON:  
[24] Q. Mr. Laughlin, once the reports come in, can you tell me  
[25] just very generally for the next step in the process what needs

[1] to be done?  
[2] THE COURT: Tell us about the next three steps that  
[3] need to be done.  
[4] Q. Or the next three.  
[5] A. Well, once we just validate that the files are submitted  
[6] correctly, they're just formatted and loaded into our  
[7] distribution identification process, which is box C, which then  
[8] gets title identifications done to all the work submitted.  
[9] From there, they're then extracted into what we call payable  
[10] affiliate records with all of the publishers and the writers  
[11] that have earned money against performances that came in from  
[12] DMX. They're then consolidated at the publisher or writer  
[13] level that would then include every one of their songs that  
[14] they're being paid for regardless of source.  
[15] We then have to validate the SDL's against those  
[16] publishers. So, for an example if there's a publisher  
[17] statement sitting in the consolidated piece of this, and it's  
[18] got a performance from DMX, we have to see if that publisher  
[19] account number was loaded into the direct or source license  
[20] database in order to remove the royalties from that record.  
[21] The other challenging part we have to this that we had  
[22] to create was the ownership resolution. If you have two  
[23] publishers and two writers and one of the publishers you linked  
[24] to the direct license database and said that his earnings  
[25] should be removed, you need to also remove the corresponding

[1] writer's earnings that is connected to that publisher. In some  
[2] cases this link between the writers and publishers don't exist,  
[3] therefore, we had to create a process, you know, to do that for  
[4] the ones that wouldn't automatically link. Then from there it  
[5] just goes into the final royalty calculation disposition where  
[6] anything we've removed for direct or source licenses the  
[7] dollars get zeroed out, the performance accounts get zeroed  
[8] out, royalty statements get created and they're sent out to the  
[9] affiliates.

[10] And then after that process in the purple box is where  
[11] we take an extract from the distribution information that we've  
[12] done after removing all the direct or source license agreements  
[13] as well as the unidentified and non-payable records that came  
[14] out of distribution, go back up to the AFBL database and do  
[15] reconciliation, problem resolution, eventually dispute  
[16] processing.

[17] Q. Thank you. And, Mr. Laughlin, have you estimated the total  
[18] cost to BMI of developing the programs and systems that you've  
[19] described?

[20] A. Yes, we have.

[21] Q. Could you turn to tab 2 in your binder? Mr. Laughlin, in  
[22] total, what have you estimated that the AFBL processes that you  
[23] described will cost BMI to develop?

[24] A. \$339,875.

[25] Q. And the top chart is listed up-front system development.

[1] process. That's 785 hours at \$8,875.

[2] Q. And where did the \$75 rate come from?

[3] A. That is our blended rate that we use for consulting  
[4] support.

[5] Q. And the next line down under outside consultant programmer  
[6] says completed to date 1,215 hours. Can you explain this line?

[7] A. Yes. That's the amount of hours and dollars that we  
[8] expensed in developing the yellow boxes that were on the chart  
[9] that we've already completed, and the rate was \$74 an hour,  
[10] because the four consultants that were working on it were  
[11] slightly less than what our blended rate really came to be.

[12] Q. And to date for outside consultant programming, how much  
[13] has BMI incurred?

[14] THE COURT: 1215 hours at a cost of \$90,405.

[15] MR. BENTON: Yes, your Honor.

[16] THE COURT: 445 dollars.

[17] Q. Could you turn to tab 3, Mr. Laughlin? Can you identify  
[18] these documents?

[19] A. Yes. They're billing invoices for the outside consultants  
[20] who worked on this project.

[21] Q. Okay, and do these invoices relate to the chart that we  
[22] just looked at?

[23] A. They are for the yellow boxes that we've done the  
[24] programming completed.

[25] Q. They're for the \$90,445?

[1] A. Yes, that's correct.

[2] Q. And is this all the components of that 339,875?

[3] A. Yes, it is.

[4] Q. And the first line reads BMI operations senior programmer.  
[5] Do you see that?

[6] A. Yes, I do.

[7] Q. Can you explain what that line refers to?

[8] A. That is a BMI programming staff member. The estimate,  
[9] which is the remaining, is 1103 hours at \$86,034, at a rate of  
[10] \$78 an hour.

[11] Q. So you're estimating for BMI's internal programming needs  
[12] for the AFBL, a further \$86,000?

[13] A. That is correct.

[14] Q. Under that it says completed to date, 297 hours. Can you  
[15] explain that?

[16] A. Yes. That is the amount of money that we spent in the  
[17] yellow boxes on the graph of BMI internal hours which were 297  
[18] at a cost of 23166.

[19] Q. And is there a particular programmer that did this work?

[20] A. Yes, Anita Winters.

[21] Q. The next entry under employee consultant is BMI's  
[22] operations outside consultant programmer. Under the estimated  
[23] line, can you explain that entry?

[24] A. Yes. That is the estimated hours and dollars that are  
[25] remaining for the task that we need to do to complete the AFBL

[1] A. That is correct.

[2] MR. BENTON: Your Honor, I would move the admission of  
[3] Plaintiff's Exhibit 0203 into evidence?

[4] MR. LARSON: No objection, your Honor.

[5] THE COURT: If there's a total expressed as a total in  
[6] another exhibit, they're here available for inspection by the  
[7] other side. Why do they need to be introduced into evidence?

[8] MR. BENTON: Why do the invoices need to be  
[9] introduced?

[10] THE COURT: That's the question.

[11] MR. BENTON: Well, your Honor, I mean --

[12] THE COURT: Who needs them?

[13] MR. BENTON: I assume the Court needs them to prove  
[14] that --

[15] THE COURT: Do you think I'm going to audit them?

[16] MR. BENTON: I'm sorry.

[17] THE COURT: Do you wish them in for purposes of cross?

[18] MR. LARSON: No, your Honor.

[19] MR. BENTON: Your Honor, if you accept Mr. --

[20] THE COURT: The summary is in evidence.

[21] MR. BENTON: That's fine, your Honor.

[22] THE COURT: The rules of evidence provide for this  
[23] sort of situation.

[24] MR. BENTON: Well, your Honor, actually, the tab, tab  
[25] 2 was not in evidence, as it's a demonstrative.

[1] **THE COURT:** The figure of \$90,000 is in evidence,  
[2] because the witness used it on direct.

[3] **MR. BENTON:** Very good, your Honor.

[4] **THE COURT:** They're excluded as needlessly cumulative.

[5] **MR. BENTON:** Yes, your Honor.

[6] **Q.** And, Mr. Laughlin, turning back to tab 2, have you also  
[7] estimated what it will cost your department on an ongoing basis  
[8] to administer the AFBL for DMX?

[9] **A.** Yes, we have.

[10] **Q.** And what is the amount that you've estimated?

[11] **A.** \$37,073 a year.

[12] **Q.** There's two employee and consultants listed on this chart.  
[13] The first one is a part-time employee manual processing of  
[14] data. Can you explain that?

[15] **A.** Yes. That's a part-time person that is on staff currently  
[16] at BMI. Some of their duties will include 30 hours per  
[17] distribution quarter to conduct the manual resolution that we  
[18] spoke of before between trying to link the writers and the  
[19] publishers from the report that comes out of that new process  
[20] in order that we can correct them.

[21] **Q.** And the second entry, could you explain that?

[22] **A.** Yes, the second entry is myself, for about 30 hours per  
[23] quarter going through the auditing of the process, once we get  
[24] it all completed, make sure everything is working fine, having  
[25] meetings with performing rights and licensing on any issues

[1] **Q.** Meaning in the first set of data it was wrong by a million  
[2] performances?

[3] **A.** That's correct.

[4] **Q.** Did BMI communicate this to DMX?

[5] **A.** Yes, we did.

[6] **Q.** And were these errors rectified?

[7] **A.** Yes, they were.

[8] **Q.** And was another set of data provided to BMI from MRI?

[9] **A.** Yes.

[10] **Q.** Was BMI able to process that set of data?

[11] **A.** No, it did not.

[12] **Q.** And why is that?

[13] **A.** It contained test channels from DMX that should have been  
[14] removed before they sent the file to us.

[15] **Q.** And what are test channels?

[16] **A.** Test channels are channels that DMX sets up that is not  
[17] really made commercially available to anybody, so therefore we  
[18] don't count them as performances. And DMX removes them from  
[19] the information that they supply to us, or notifies us of them  
[20] being there and then we remove them. But in this case when we  
[21] had a discussion with MRI, MRI didn't even know about this test  
[22] channel routine that was going on at the time, and so therefore  
[23] we had to work with DMX to resolve that and remove those test  
[24] channels.

[25] **Q.** And when were these test channels ultimately removed?

[1] that may crop up with regards to direct licenses or other  
[2] related tasks.

[3] **Q.** And you mentioned earlier that MRI has provided interim fee  
[4] reports to IBM, is that correct?

[5] **A.** Yes, that's correct.

[6] **Q.** And when did MRI first provide BMI with interim fee data?

[7] **A.** March of 2009.

[8] **Q.** And was BMI able to process that data?

[9] **A.** No, it was not.

[10] **Q.** And why is that?

[11] **A.** Because there were errors in it.

[12] **Q.** What kind of errors?

[13] **A.** There were errors in the performance counts being grossly  
[14] overstated.

[15] **Q.** Can you explain that?

[16] **A.** There were, each individual work has a number of  
[17] performances to it. For an example if a title has a thousand  
[18] performances, that's exactly the performances that it had.  
[19] There are publisher records that come in with the file and what  
[20] had happened is that thousand was populated amongst all of the  
[21] publisher records rather than as the title record. So, for  
[22] example, if it had two publishers, we were being reported that  
[23] that work had 2,000 performances on it when in reality it only  
[24] had 1,000 performances, and that equated to about a million  
[25] performances in the off-premise file.

[1] **A.** When we got the file in October of 2009.

[2] **Q.** Okay. And do you know how long you and your department  
[3] spent on resolving the issues with the interim fee data from  
[4] MRI?

[5] **A.** Probably worked on it a couple of hundred hours.

[6] **Q.** Okay, and over what time period did that occur?

[7] **A.** Between March and October.

[8] **Q.** Did this have any effect, the errors in the MRI data, on  
[9] BMI's ability to begin programming on the AFBL?

[10] **A.** No, it did not.

[11] **Q.** Well, did you need to get a complete set of data for any  
[12] reason for the programming on the AFBL?

[13] **A.** Well, we needed -- we already knew the values of what the  
[14] fields were, even though the file was not capable of usage. So  
[15] creating the database and figuring out what we needed to do  
[16] from some programming standpoints, we could still complete  
[17] that.

[18] **Q.** And why did you begin programming only after August?

[19] **A.** Well, that was the first time that we had the direct or  
[20] source licenses all figured out and what we needed to do there  
[21] and we needed to get it in the database because we were under a  
[22] mandate to start removing direct or source license works from  
[23] our database effective with the distribution that we processed  
[24] in December, and then eventually paid in January.

[25] **THE COURT:** Why do these kinds of costs that you've

[1] been describing, by and large, form a part of a rate setting  
[2] case? Why aren't they more logically viewed as matters which  
[3] should be or should not be included in a bill to DMX for the  
[4] costs incurred in making special arrangements for DMX but  
[5] regarded as a one-time expense, not something which would be  
[6] incorporated in a continuing fee or rate for the performance of  
[7] music?

[8] **MR. BENTON:** Well, your Honor, certainly both parties'  
[9] proposals include amounts, include in principle amounts for  
[10] incremental costs.

[11] **THE COURT:** I'm not questioning that. I'm just asking  
[12] why.

[13] **MR. BENTON:** I think in concept I think it could be  
[14] done that way, your Honor, except for the ongoing portion. Of  
[15] course, that could be also I suppose a bill that was sent to  
[16] DMX every quarter or every year for the costs incurred.

[17] **THE COURT:** Look. The ongoing portion is 37,000 and  
[18] change. The major portion is 340,000 and change.

[19] **MR. BENTON:** That's correct, your Honor.

[20] **THE COURT:** Which would you rather discuss?

[21] **MR. BENTON:** I'm sorry?

[22] **THE COURT:** Which would you rather discuss?

[23] **MR. BENTON:** Well, certainly the concept of taking the  
[24] \$339,000 in up-front development and sending a bill to DMX, I  
[25] don't think there's anything wrong with that concept. That's

[1] discrete, finite situation?

[2] **MR. BENTON:** I think it could be billed, the initial  
[3] development cost could be billed separately.

[4] **THE COURT:** My question is why shouldn't it?

[5] **MR. BENTON:** Your Honor, I can't think of a reason why  
[6] we shouldn't bill DMX for the money we spend on developing this  
[7] system.

[8] **THE COURT:** Any grayer heads have anything to add?  
[9] Mr. Rich? You rise?

[10] **MR. RICH:** Your Honor, I always fear that this part of  
[11] the case overwhelms the real meat of the case.

[12] **THE COURT:** Excuse me?

[13] **MR. RICH:** I always fear that this part of these cases  
[14] has a tendency, as I think you're suspecting, of overwhelming  
[15] the meat of the case, which is what is the core rate dispute.

[16] **THE COURT:** Yes.

[17] **MR. RICH:** I think the only principal point that we  
[18] want the Court --

[19] **THE COURT:** It's actually harmful, because it  
[20] eventually complicates a calculation which is plenty sensitive  
[21] and difficult enough with considerations which are temporal  
[22] rather than permanent, finite rather than continuing, and which  
[23] raise the type of questions what should be included in the  
[24] bill, what shouldn't, what should be spread over others and  
[25] what shouldn't, which are much more handily dealt with in a

[1] not what the parties have --

[2] **THE COURT:** But there may be something wrong with the  
[3] concept that it should be incorporated in a license arrangement  
[4] for the continued performance of music.

[5] **MR. BENTON:** Well, I don't think so, your Honor.

[6] **THE COURT:** I'm sure it can be done, but I'm asking  
[7] why is that the more logical or more businesslike concept?

[8] **MR. BENTON:** Well --

[9] **THE COURT:** When the rate contains all these other  
[10] consequences.

[11] **MR. BENTON:** Well, your Honor, I think the concept  
[12] that the AFBL, which requires, which is a license that requires  
[13] additional processing steps and additional systems to be  
[14] developed and additional people, not only from Mr. Laughlin's  
[15] department but from other departments as you heard Mr. O'Neill  
[16] testify to the other day, the concept that these incremental  
[17] costs above what a normal blanket license should be paid is an  
[18] important one. Because if those incremental costs are not  
[19] picked up by the user that chooses the AFBL, then BMI's  
[20] affiliates who do not directly license can experience a  
[21] shortfall, even though the value of their music hasn't  
[22] diminished at all.

[23] **THE COURT:** That may be entirely correct, but it has  
[24] nothing to do with the question I asked, which is why shouldn't  
[25] it be billed separately, where it can be fought over as a

[1] dispute within the terms of a finite sort of bill, rather than  
[2] in a case setting a rate for an industry composed of a great  
[3] many people whose relationship to these charges is rather  
[4] collateral.

[5] **MR. RICH:** I have no dispute with any of that. But  
[6] there's one interesting and I think not obvious question in  
[7] terms of its answer, your Honor, where the parties disagree,  
[8] which is as your Honor knows, DMX made a very large investment,  
[9] including through this case, to develop the contours and  
[10] parameters of this so-called carveout license. It's been a  
[11] long road to get here because it wasn't one from the beginning  
[12] that BMI said, sure, let's do it. It had to be litigated  
[13] through the Second Circuit, as you know, and so forth. So  
[14] they've made a big investment in real terms and as you're  
[15] learning they're not the biggest company on the face of the  
[16] media, and there's an interesting question to, and a  
[17] significant economic question, it seems, which is now that BMI  
[18] is putting together an infrastructure, and I don't doubt for a  
[19] minute the sincerity of the efforts that Mr. Laughlin is --

[20] **THE COURT:** You're coming to the point, aren't you?

[21] **MR. RICH:** Yes. I apologize. The point is only  
[22] should DMX bear the entire up-front cost of being the --

[23] **THE COURT:** Of course that's a question.

[24] **MR. RICH:** Naturally it's a question. It's not  
[25] whether --

[11] **THE COURT:** But it's partially a question as between  
[12] you and the class, it's partly a question of between you and  
[13] BMI, and the reciprocal question is should BMI be charging all  
[14] these costs to you rather than in some other mechanism which  
[15] spreads the cost of the benefit over those who receives the  
[16] benefit.

[17] **MR. RICH:** I would submit that your Honor has some  
[18] control over the second, whereas DMX has no ability on the  
[19] first to spread its cost among the rest of the industry. If  
[20] they were to send a bill to Muzak or Music Choice --

[21] **THE COURT:** Of course it has an ability. It has an  
[22] ability to object to BMI's effort to increase the size of the  
[23] rate by the inclusion of this kind of cost.

[24] **MR. RICH:** Yes.

[25] **THE COURT:** On the argument that it is more fittingly  
[26] handled by the mechanism of a charge, which can be disputed on  
[27] its own merits. In what form I wouldn't have the temerity to  
[28] say. But somewhere, surely.

[29] **MR. RICH:** As I understand you, I think that's very  
[30] close to our actual position, which is that it would be  
[31] inappropriate to build a fee that captures the full up-front  
[32] cost here. There should be some other mechanism for an  
[33] equitable portion of it. To the extent your Honor is a bit  
[34] reluctant to --

[35] **THE COURT:** There are two aspects to it. One is the

[1] admittedly on the subject on a granular level, as here, as to  
[2] how many computers had to be installed and how many programs.  
[3] It's awkward, but I don't know if we have figured out a way to  
[4] avoid, if we can't between the parties reach an agreement, I  
[5] would hope making through this we could, prodding, but if we  
[6] can't, I don't know if there is a mechanism that's available  
[7] particularly to DMX where BMI is taking a position which is it  
[8] should get built into the very fee mechanism through this floor  
[9] fee so-called, they're taking this data and as you know, their  
[10] proposal is that that cost structure should be built into the  
[11] minimum fee to which BMI would be entitled no matter how much  
[12] direct licensing actually occurs and that has real dollars and  
[13] cents consequences, of course.

[14] At DMX it's our job to provide the Court with the  
[15] views as to the degree to which and the extent to which that  
[16] charge we feel is appropriate. We're always open to some other  
[17] mechanism for a reasonable sharing of expenses that properly  
[18] ought to be allocable to our client. Our proposal says  
[19] forthrightly to the Court in our trial submissions, yes, we  
[20] recognize that if there are legitimate incremental costs  
[21] associated with operating this new form of license, our client  
[22] ought to pay for those. The question is, what are reasonable  
[23] incremental costs and, you know, as this testimony is  
[24] indicating, I think there may be different ways to think about  
[25] amount and apportionment, particularly on the front end where

[1] argument that it shouldn't all be charged to you because you're  
[2] acting on behalf of what we might loosely call a class, a lot  
[3] of other beneficiaries. The other argument is does this kind  
[4] of expenditure have a legitimate place in the calculation of a  
[5] rate rather than some other form of charge. That's the  
[6] question I'm raising now. I recognize the presence of the  
[7] other question.

[8] **MR. RICH:** It could legitimately be viewed several  
[9] ways. We struggled considerably with this issue and the one  
[10] other context was which I'm most familiar, your Honor, and if  
[11] you'll indulge me to go across the street, figuratively to the  
[12] ASCAP court for a moment.

[13] **THE COURT:** Oh, dear, there's that clause in the  
[14] decree that I've always worried about.

[15] **MR. RICH:** I'm simply by a factual analogy, when the  
[16] per program license which you've heard a bit about here was  
[17] developed there, that very issue was the subject of even  
[18] considerably more testimony and struggle, which is does this  
[19] come into the rate as a percentage increase, is it a discreet  
[20] series of charges, and, candidly, as you'll hear here, the  
[21] economists had opposing views.

[22] At the end of the day, I regret to say it was thrown  
[23] into Magistrate Judge Dolinger's lap and in his decision he  
[24] decided to approach it in a particular fashion that he thought  
[25] was Solomonic justice, having had way too much evidence

[1] that \$300,000, I don't doubt it was or may be spent, subject to  
[2] my colleague's cross-examination questions, but the question  
[3] is, if the television industry or the radio industry or other  
[4] background music services may decide this is pretty good, it  
[5] strikes us as onerous that the pioneers who invested in getting  
[6] to that point ought to bear the entirety of that expense going  
[7] in. But I confess, your Honor, your question's a very fair one  
[8] and I don't know that it's an obvious topic that should  
[9] otherwise be occupying this much of the Court's time. We just  
[10] don't have an easy way around it.

[11] **MR. SALZMAN:** Your Honor, on behalf of BMI, I would  
[12] say several things in response to Mr. Rich. First, up until  
[13] this very moment, the bona fides of BMI's charges were hotly  
[14] contested. You might remember that there was an insistence on  
[15] having Mr. Laughlin's deposition, which was taken yesterday, to  
[16] verify those invoices and the spreadsheet and so on. So it's  
[17] great if there can be agreement. I am extremely pessimistic  
[18] that there actually will be agreement without at least the  
[19] assurance that the Court would be there to decide, and we have  
[20] made great effort, I think both sides have expended a lot of  
[21] money to put it before the Court now. So whether -- that's  
[22] first. So that if you'd sent us into a room, I don't think we  
[23] would get there, and if your Honor were to issue a decision  
[24] about everything else, we would be back here.

[25] Second, I would say that both sides' economists agree

[1] that not only BMI's ongoing costs -- one side says  
[2] 11.7 percent, one side says 17 percent -- should be in this  
[3] base fee, but both sides also agree that incremental costs at  
[4] least on an ongoing basis, those costs, and we say an allocable  
[5] share each year of the development cost should be in that base  
[6] fee.

[7] If you take out the up-front development costs and put  
[8] them in a separate bill, I don't know what the economists would  
[9] say, but again, I don't see why that discreet component can't  
[10] come out, if it could be agreed to or decided by the Court  
[11] separately and paid for.

[12] Third, as to the concept that this is the beginning of  
[13] a benefit that the radio industry or the television industry or  
[14] many other classes of people might use, I would say that  
[15] remains to be seen. The background music industry uses music  
[16] in a particular way, uses feature songs only and it's a song by  
[17] song thing. It's quite different, for example, from what the  
[18] television industry does. It might be completely different  
[19] sets of processes needed for television music, which is  
[20] different than -- it's the cue sheet database, it's not the  
[21] song database. It's quite a bit different.

[22] So BMI's approach on this third part is to say so far  
[23] we have one user, allocate cost to it and I think as  
[24] Mr. O'Neill said, if other people come along and there is  
[25] adjustment because the same processes are usable, then that's

[1] fair and BMI is open to it. But meanwhile, BMI has these real  
[2] costs and it's proposing that not all of them but a share  
[3] spread over time would be paid.

[4] (Continued next page)

[1] **THE COURT:** Well, I think I will only respond to that  
[2] by making three observations which are certainly not rulings,  
[3] not at this point.

[4] First, I'm not interested in promoting an agreement or  
[5] settlement. I think we are past that and it would waste time  
[6] which is necessarily going to be consumed by the conduct of the  
[7] trial. If you want do that, God bless you, but not because I  
[8] urge you.

[9] Second, I agree with the obvious observation that the  
[10] costs fall into two categories, one being the cost of what I  
[11] think what you are saying is development costs, putting  
[12] yourself in a position to administer the adjustable rate  
[13] license; and the second component is the costs of operating it  
[14] on an ongoing basis. And I would think anybody who didn't know  
[15] anything about economics would say the first is a capital cost  
[16] which should be addressed separately and I suggest billed  
[17] separately and the continuing one is one that has a much more  
[18] natural part in a rate 7 exercise.

[19] And third, I think we are all deferring, for the  
[20] moment, at least except for glancing references so far, the  
[21] question which will arise about the development costs, whether  
[22] they are or are not, in toto or in very large part, an expense  
[23] which BMI should expect to absorb itself under its duty to  
[24] provide an adjustable rate license.

[25] But, that's a whole argument of law, not of economics.

[1] **MR. SALZMAN:** If I could just very briefly address  
[2] that third point?

[3] It is a point of law. We think it is quite clear from  
[4] the Second Circuit's decision as well as from the decree that  
[5] the Second Circuit was construing that when an applicant  
[6] applies for a license, BMI is entitled to be charged a  
[7] reasonable fee for that license. And the reasoning of the AEI  
[8] court, the Second Circuit was they can have any, some, or all,  
[9] they're entitled to that carve-out provision but you can go  
[10] charge them for that license and here there are additional  
[11] administrative costs including costs. So, we think it is  
[12] settled that they should pay the costs of that license.

[13] **THE COURT:** They may have thought that the license  
[14] covered the playing of the music rather than the generation of  
[15] the operations of the agreement but, as I say, I think we are  
[16] all happy to defer that to another afternoon. There remains  
[17] the question of where these costs forming really a proper part  
[18] of the calculations in setting a rate --

[19] **MR. SALZMAN:** In terms of where we are --

[20] **THE COURT:** I raised it because I was curious but now  
[21] I'm becoming quite fascinated with it.

[22] **MR. SALZMAN:** In terms of where we are in the trial  
[23] and why we are all here and what work has been done to this  
[24] point, my observation would be that both sides agree that the  
[25] base fee should have costs in it. We, both sides have tested

[1] each other as to how to measure those costs and what are  
[2] appropriate costs and what aren't. I agree with Mr. Rich that  
[3] there is no other forum and I would submit that we should go  
[4] forward, submit the proof, make the arguments we need to make  
[5] and not have a situation where there is a decision as a prelude  
[6] to a dispute.

[7] **THE COURT:** Well, then I think you better be prepared  
[8] for the possibility that you will be directed to prepare  
[9] alternate forms, one in which these costs are judicially  
[10] directed to be billed outside the fee structure which will then  
[11] be simplified by their exclusion and the consequences that that  
[12] would have on the remaining of the fee setting problem and  
[13] present them for separate recompense or treatment.

[14] **MR. SALZMAN:** I understand, your Honor.

[15] **MR. RICH:** Thank you, your Honor.

[16] **BY MR. BENTON:**

[17] **Q.** Mr. Laughlin, do you have an understanding of which data,  
[18] on-premises or off-premises, DMX is proposing in this case to  
[19] use for the AFBL?

[20] **A.** Yes, I do.

[21] **Q.** And what is that understanding?

[22] **A.** The understanding is that they would use off-premise as a  
[23] surrogate for on.

[24] **Q.** And based on BMI's data, do you know if DMX' off-premises  
[25] performances are representative of its on-premise performances?

[1] second quarter 2009 production distribution.

[2] **Q.** Okay. And who is Mr. Parrington?

[3] **A.** He is a project manager that works in our IT applications  
[4] department.

[5] **Q.** And looking at the top chart, does this top chart have to  
[6] do with DMX' off-premise performance data?

[7] **A.** Yes, it does.

[8] **Q.** And what quarter was this analysis done on?

[9] **A.** The second quarter of 2009.

[10] **Q.** And, can you tell me the process by which this chart was  
[11] created?

[12] **A.** Yes. It was -- we created it from the performance data  
[13] that we got directly from DMX --

[14] **THE COURT:** Excuse me, Mr. Benton. Where are you now?

[15] **MR. BENTON:** At tab 10, your Honor.

[16] **THE COURT:** 10. Thank you.

[17] **MR. BENTON:** We skipped a few.

[18] **THE COURT:** Yes. That's okay. All right.

[19] **THE WITNESS:** The first chart's example we used the  
[20] data that we got from DMX in its original format which is what  
[21] we processed through our production distribution, and just a  
[22] few weeks ago made payments to all of the works identified that  
[23] didn't contain a director source license, and we also used the  
[24] direct licenses that were validated during production in  
[25] December and the performances for just related to the

[1] **A.** No, it is not.

[2] **Q.** And how do you know that?

[3] **A.** We ran -- just recently we ran our distribution where we  
[4] had to remove all the director source licenses. Currently, we  
[5] are using both the on and off-premise data that gets submitted  
[6] directly from DMX to process those distributions and take out  
[7] the director source licenses that we have already validated  
[8] that we had. We did some analysis on the number of unique work  
[9] titles that existed between both on and off and found that only  
[10] 28 percent of the titles overall that constituted DMX was  
[11] really located in both on and off-premise.

[12] **Q.** So, when you looked at the titles that DMX was performing  
[13] on its on and off-premise services, only 28 percent of them  
[14] were included in both services?

[15] **A.** That's correct.

[16] **Q.** And could you turn to tab 10 in your binder?

[17] **THE COURT:** The positive way of stating that is that  
[18] except for 28 percent, all of the off-premises titles are  
[19] different from the on-premises titles?

[20] **THE WITNESS:** That is correct.

[21] **Q.** Can you identify this document, Mr. Laughlin?

[22] **A.** Yes.

[23] **Q.** What is it?

[24] **A.** It is a document that contains an analysis that was  
[25] performed from Aaron Parrington, P-A-R-R-I-N-G-T-O-N, using our

[1] off-premise. Then we calculated the direct license ratio  
[2] against those performances for that file by analyzing the  
[3] information that we had at a detailed level for off-premise.

[4] **BY MR. BENTON:**

[5] **Q.** And when you say direct license ratio, does that mean you  
[6] took a look and saw what DMX' credit would be by running DMX'  
[7] performance data against BMI's AFBL process that you described  
[8] earlier?

[9] **A.** Yes.

[10] **Q.** What credit did you find DMX would be entitled to use on  
[11] its off-premise data for the second quarter of 2009?

[12] **A.** 36.64.

[13] **Q.** And the bottom chart --

[14] **THE COURT:** Before you get there, total BMI  
[15] performances means of the same music or of its entire  
[16] inventory?

[17] **THE WITNESS:** No. Just for the music that was  
[18] identified --

[19] **THE COURT:** By DMX.

[20] **THE WITNESS:** -- by BMI from its database of the  
[21] performances that happened in the on-premise file that was  
[22] submitted. So, the total BMI performances equal the total  
[23] number of performances from song titles given to BMI by DMX  
[24] where we have identified it to a song number.

[25] **THE COURT:** So it is all the performances of those

[1] songs?

[2] **THE WITNESS:** Right, that had a BMI participation in.

[3] **THE COURT:** Yes.

[4] **BY MR. BENTON:**

[5] **Q.** I think you were just discussing the off-premises data,  
[6] Mr. Laughlin?

[7] **A.** Yes.

[8] **Q.** Is that right?

[9] **A.** Yes.

[10] **Q.** And then the bottom chart, this says second quarter 2009  
[11] summary on-premises performances only created by BMI from  
[12] performance data received from DMX in original format and using  
[13] direct licenses validated by BMI.

[14] Here did you take DMX' on-premise data that it gave to  
[15] BMI to find out what its credit would be?

[16] **A.** That is correct.

[17] **Q.** And what did you find?

[18] **A.** We found that the credit rate for the performances within  
[19] on-premise we equated to 21.47 percent.

[20] **MR. BENTON:** Your Honor, I would move this Exhibit  
[21] into evidence, PX 0201.

[22] **MR. LARSON:** Your Honor, we object to the admission of  
[23] the document.

[24] **THE COURT:** Excuse me?

[25] **MR. LARSON:** Object to the admission of the document.

[1] of the information that was identified from DMX during that  
[2] quarter and then it gave a breakdown. This is what I  
[3] referenced before where only 28 percent of those titles were  
[4] located in both the on and off-premise data.

[5] **MR. BENTON:** Your Honor, I would move this exhibit  
[6] into evidence, HX 0200.

[7] **MR. LARSON:** Offer the same objection, your Honor.

[8] **MR. BENTON:** Your Honor, we would also make the data  
[9] available for this.

[10] **THE COURT:** Same ruling.

[11] **MR. BENTON:** Pass the witness, your Honor.

[12] **CROSS EXAMINATION**

[13] **BY MR. LARSON:**

[14] **Q.** Good afternoon, Mr. Laughlin.

[15] **A.** Good afternoon.

[16] **Q.** I would like to start with the discussion of the MRI  
[17] interim fee data that you were provided, if we could. Now, I  
[18] think you testified that DMX provided a first set of reports to  
[19] BMI in march of last year, is that correct?

[20] **A.** That is correct.

[21] **Q.** And, after some analysis of the reports by BMI, BMI,  
[22] through its counsel, notified DMX of some of the errors that it  
[23] found in the reports, correct?

[24] **A.** That is correct.

[25] **Q.** And that was the performance count issue that you alluded

[1] **THE COURT:** Why?

[2] **MR. LARSON:** It is hearsay, first of all. It was  
[3] created by Mr. Parrington, not by the witness as he just  
[4] testified. It is clearly being offered for the truth of the  
[5] matter asserted. I also think there is a best evidence issue  
[6] as some sort of summary sheet of an underlying study that was  
[7] done without any presentation to us of the underlying work. We  
[8] got this document about a week ago. All we got was, literally,  
[9] this page.

[10] **THE COURT:** Can you make it available for them to  
[11] inspect over the weekend?

[12] **MR. BENTON:** Yes. Sorry. We can, I believe, your  
[13] Honor.

[14] **MR. LARSON:** Thank you.

[15] **THE COURT:** Please do so and we will revisit this  
[16] objection on Monday morning.

[17] **BY MR. BENTON:**

[18] **Q.** Mr. Laughlin, could you turn to tab 11? Can you identify  
[19] this document?

[20] **A.** Yes, I can.

[21] **Q.** And what is it?

[22] **A.** It is a study that we did for the time period of the third  
[23] quarter of 2008, it was conducted by Lee Greer who works in our  
[24] strategic operations department. It was an exercise to take a  
[25] look at the 33,420 unique song titles that existed across all

[1] to in your testimony?

[2] **A.** Yes.

[3] **Q.** And, are you aware that that communication was made in the  
[4] middle of April of 2009?

[5] **A.** I didn't recall.

[6] **Q.** But, in any case, at some point shortly after the March  
[7] submission of the report, correct?

[8] Now, revised reports were provided to BMI on May 12th,  
[9] is that right?

[10] **A.** I don't recall what date they came in.

[11] **Q.** Shortly after the issues were communicated between BMI and  
[12] DMX?

[13] **A.** Yes.

[14] **Q.** And so, shortly after that those reports actually took care  
[15] of the problems that you notified DMX of, correct?

[16] **A.** In the first -- in the first submission, that's correct.

[17] **Q.** Save for the test channel issue that was raised?

[18] **A.** Would you repeat the question?

[19] **Q.** My question is the reports took care of the issues you  
[20] raised except for the test channel issue, correct?

[21] **A.** That is correct.

[22] **Q.** Now, MRI and DMX ultimately removed those test channels  
[23] too, didn't they?

[24] **A.** Yes, they did.

[25] **Q.** And they gave you new reports that didn't have those